Supreme Court, U.S.
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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KENNETH DON EARLES, C.P.A., *et al.*,
Petitioners,

v.

STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANTS OF LOUISIANA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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86 pp

QUESTIONS PRESENTED

I. Does the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), confer appellate jurisdiction over an antitrust defendant's interlocutory appeal from a trial court's denial of a motion to dismiss grounded in the state action exemption of *Parker v. Brown*, 317 U.S. 341 (1943)?

II. May a state professional regulatory board claim the *Parker* exemption to avoid liability for interpreting and enforcing regulations with the sole effect of fixing prices, where the legislature has authorized the board only to regulate the profession in the public interest and has not authorized the board to regulate prices?

III. May a state professional regulatory board, made up entirely of self-interested economic actors who compete in the profession they regulate, claim the *Parker* exemption even though the board cannot demonstrate that the State actively supervises the board's challenged anticompetitive activities?

RULE 14.1(b) AND RULE 29.6 STATEMENTS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioners state that the list of parties in the court of appeals whose judgment is sought to be reviewed is as follows:

Kenneth Don Earles, CPA
Albert R. Leger, CPA
Joseph Michael Sledge, CPA
The State Board of Certified Public Accountants of Louisiana
Mildred M. McGaha, CPA
L. Paul Hood, CPA
Leon K. Poché, CPA
Lawrence W. Stoulig, Jr., CPA
Donald L. Moore, CPA
W. Theron Roberts, CPA
Michael A. Tham, CPA
Susan C. Cochran, CPA
J. Gordon Reische, CPA

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state as follows:

None of the named petitioners has any corporate parent, subsidiary, or affiliate that is publicly held.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Kenneth Don Earles, Albert R. Leger, and Joseph Michael Sledge, respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-23a) is reported at 139 F.3d 1033. The district court did not issue a written opinion. Its order denying respondents' motion to dismiss (*id.* 24a) is not reported. The court of appeals' order denying petitioners' petition for rehearing and suggestion of rehearing *en banc* (*id* 25a-26a) is not reported.

JURISDICTION

The court of appeals entered its judgment on April 24, 1998, and denied a timely filed petition for rehearing and suggestion of rehearing *en banc* on June 3, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Antitrust Act, codified at 15 U.S.C. § 1; sections 37:73 through 37:76 of the Louisiana Accountancy Law; and sections 46:XIX.501 C and 46:XIX.501 E of the Louisiana Administrative Code are reproduced at Pet. App. 27a-36a.

STATEMENT

Petitioners are practicing certified public accountants ("CPAs") in the State of Louisiana.[1] Each petitioner provides tax and accounting services to individuals and small businesses. In addition, each petitioner for several years has offered investment advisory and securities brokerage

[1] Because this case never has advanced beyond the motion-to-dismiss stage, this account of the facts is drawn from the pleadings below.

services to some tax and accounting clients. All the major national CPA standard-setting bodies and the vast majority of the States permit CPAs to provide such services in conjunction with tax practice. Petitioners have offered investment services because of their clients' demand for full-service financial assistance. None of the petitioners ever has been accused of conducting any aspect of his business with anything less than exemplary ethical probity.

Respondents, the State Board of Certified Public Accountants of Louisiana and its individual members (collectively referred to as "the board"), for several years have engaged in a relentless campaign to ban petitioners' joint accounting and investment practices, on the ground that petitioners' receipt of compensation in the form of commissions for investment advisory services categorically impairs petitioners' objectivity. Petitioners brought the instant action to defend their livelihoods, contending, *inter alia*, that the purpose and effect of the board's actions is not to protect the public but to fix prices for professional services, in violation of federal and state antitrust law. The questions presented in this petition all concern whether the board can cloak itself in the sovereign's exemption from federal antitrust liability in order to avoid answering petitioners' allegations.

The Louisiana Regulatory Scheme. The State Board of Certified Public Accountants of Louisiana comprises seven members, all of whom must be CPAs. The Governor, based on recommendations from the Society of Louisiana CPAs, appoints the board members to indefinite terms, and the Senate confirms the appointments. La. Rev. Stat. Ann. § 37:73. Neither the Governor nor the legislature supervises the board's activities.

The Louisiana Accountancy Law authorizes the board to "[a]dopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public

accounting in the state of Louisiana," La. Rev. Stat. Ann. § 37:75(B)(2), and to "[t]ake appropriate administrative action to regulate the practice of public accounting in the State of Louisiana in the interest of and to preserve the public health, safety and welfare." La. Rev. Stat. Ann. § 37:75(A)(3). Pursuant to this rulemaking authority, the board has promulgated requirements for licensure and continuing professional education, rules governing the operation of the board itself, and a Code of Ethics.

Two provisions of the Code of Ethics are at issue in this case. The first, the "commissions rule," provides that "[a] licensee shall not pay a commission to obtain a client or accept a commission for a referral to a client of products or services of others." 3 La. Admin. Code § 46:XIX.501 C. The second provision, the "incompatible occupations rule," provides that

> [a] licensee shall not concurrently engage in the practice of public accountancy and in any other business or occupation which impairs his independence or objectivity in rendering professional services, or which is conducted so as to augment or benefit the accounting practice unless these rules are observed in the conduct thereof.

3 La. Admin. Code § 46:XIX.501 E. This case arose when the board invoked these two rules in an attempt to bar CPAs such as Earles, Leger, and Sledge from providing the investment advisory and securities brokerage services their clients demand.

Course of Proceedings Below. On February 23, 1990, the board brought an administrative complaint against petitioner Earles, alleging that he had violated the commissions and incompatible occupations rules. After an administrative hearing—at which the board produced no evidence that Mr. Earles' activities had harmed or deceived any client in any way, or that his objectivity ever had been impaired—the board held that Mr. Earles had not violated the commissions rule merely by accepting compensation on a commission basis. The board, how-

ever, reached the inconsistent conclusion that Mr. Earles' concurrent service as a CPA and a securities broker violated the incompatible occupations rule. *See In re Kenneth Don Earles, CPA*, Notice of Decision, No. 88-09-31 (State Bd. Cert. Pub. Accts. La. Aug. 23, 1990).

Petitioner Earles filed the original complaint in this case on August 27, 1991 in the United States District Court for the Eastern District of Louisiana. The complaint alleged that the board's application of the incompatible occupations rule to bar CPAs from providing investment services amounted to a combination or conspiracy to restrain trade, because providing investment services on a commission basis does not actually impair a CPA's objectivity. The only effect of the board's action was to prevent CPAs such as Earles from decreasing the price of accounting and financial services; thus, the board's action fixed a price floor for those services, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, *et seq.*[2] The suit sought a declaration that the incompatible occupations rule was unenforceable facially or as applied and an injunction against the board's attempt to bar CPAs from selling securities.[3]

On May 31, 1996, the board served petitioners Leger and Sledge with Administrative Complaints and Notices of Administrative Hearings. The complaints against Mr.

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[2] The suit also alleged various federal constitutional claims, including claims that the board's actions infringed petitioners' commercial speech rights and denied petitioners due process and equal protection. Those claims are not at issue in this petition.

[3] The district court initially stayed the case, relying on *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), pending a state court determination whether the board had interpreted its rules correctly. Petitioner Earles proceeded to challenge the board's interpretation and application of its rules in the Louisiana Civil District Court for the Parish of Orleans. He prevailed in the state trial court but lost at the appellate level. *See Earles v. State Board of Certified Public Accountants*, 665 So. 2d 1288, 1291 (La. Ct. App. 1995), *writ denied*, 669 So.2d 397 (La. 1996). The federal district court dissolved the stay in the instant case on April 5, 1996.

Leger and Mr. Sledge, like the earlier complaint against Mr. Earles, alleged violations of the board's commissions and incompatible occupations rules, based on the petitioners' simultaneous activities as CPAs and licensed securities representatives. At the administrative hearings the board produced no evidence that either Mr. Sledge or Mr. Leger had harmed or deceived his clients in any way or that either man's objectivity ever had been impaired. Nonetheless, the board held that both petitioners had violated both the incompatible occupations and commissions rules. The board revoked the two petitioners' licenses and assessed costs.[4]

On August 15, 1996, petitioners filed the First Supplemental and Amended Complaint in this action, adding petitioners Leger and Sledge as plaintiffs. The board immediately moved to dismiss the amended complaint. As to petitioners' antitrust allegations, the board claimed it was a state agency entitled to the State's exemption from federal antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943). Petitioners responded that the board could not claim the state action exemption for two reasons. First, the board could not demonstrate that its anticompetitive actions were the reasonably foreseeable consequence of a clearly articulated and affirmatively expressed state policy to displace price competition in the public accounting profession. The board's enforcement of its rules to bar CPAs from selling securities had no conceivable purpose or effect other than regulating the price of accounting services, and that purpose bore no

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[4] *See In re Joseph Michael Sledge, CPA*, Notice of Decision, No. 95-07-19, at 10 (State Bd. Cert. Pub. Accts. La. Jan. 10, 1997); *In re Albert R. Leger, CPA*, Notice of Decision, No. 95-07-18, at 12 (State Bd. Cert. Pub. Accts. La. Jan. 10, 1997). The appeal of petitioners Leger and Sledge in Louisiana state court is pending. The federal district court, although it stayed this case pending resolution of the instant interlocutory appeal, declined to abstain pending resolution of the Leger and Sledge state court case. The board has stayed enforcement of its sanctions against petitioners Leger and Sledge pending resolution of their state court appeal.

relationship to the legislature's authorization for the board to regulate the profession. Second, the board could not show that the State had actively supervised its anticompetitive activities.

The district court denied the motion to dismiss. The board then took this interlocutory appeal to the United States Court of Appeals for the Fifth Circuit. In addition to the issues raised in the motion to dismiss, the appellate court ordered briefing on the question whether it had jurisdiction over the appeal. The board insisted the court had jurisdiction over its state action claim under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Petitioners responded that *Cohen* did not confer jurisdiction over that claim because the state action exemption is merely a defense to liabiilty, in contrast to Eleventh Amendment immunity and other immunities from suit to which this Court has extended the *Cohen* doctrine.[5]

A panel of the Fifth Circuit affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1a-23a. In the portions of the decision relevant to this petition, the panel held, first, that it had jurisdiction under *Cohen* to consider the board's state action claim. The panel explained that it was bound by the Fifth Circuit's earlier decision in *Martin v. Memorial Hospital*, 86 F.3d 1391 (5th Cir. 1996), which had held, with little explanation and no support, that "*Parker v. Brown* state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities—'an entitlement not to stand trial under certain circumstances.'" *Martin*, 86 F.3d at 1395 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)).

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[5] Respondents also appealed the trial court's denial of their Eleventh Amendment defenses to this action. Petitioners acknowledged that the Fifth Circuit had jurisdiction over that portion of the appeal. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); *see also infra* section I.B.

Having asserted jurisdiction, the panel proceeded to hold that the board was entitled to state action immunity. Applying the test set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the court held that the board had taken its challenged actions pursuant to a clearly articulated and affirmatively expressed state policy to "reject[] pure competition among public accountants in favor of establishing a regulatory regime that inevitably has anticompetitive effects." Pet. App. 22a. The panel found that the Accountancy Law "grants[] the Board broad power to regulate the profession of accounting." *Id.* 20a. That power, according to the panel, "includes the power to adopt rules that may have anticompetitive effects. It is thus the 'foreseeable result' of enacting such a statute that the Board may actually promulgate a rule that has anticompetitive effects." *Id.* 21a-22a. Thus, according to the Fifth Circuit, a broad authorization to regulate that contemplates some degree of anticompetitive rulemaking necessarily confers unlimited power to fix prices.

The panel also held that the second *Midcal* requirement, that a nonsovereign actor's anticompetitive conduct must be "actively supervised" by the sovereign, did not apply in this case. The panel made clear that the board could not show active supervision and that, therefore, it could not claim the *Parker* exemption if the second *Midcal* requirement applied. But the panel again deferred to Fifth Cicuit precedent, citing *Benton, Benton & Benton v. Louisiana Public Facilities Authority*, 897 F.2d 198, 203 (5th Cir. 1990), for the proposition that a "state agency" need not satisfy the "active state supervision" test. *Benton*, in turn, relied entirely on this Court's decision in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), which expressly reserved the question whether the "active supervision" requirement applied to state agencies. *See Benton*, 897 F.2d at 203 (citing *Town of Hallie*, 471 U.S. at 46 n.10 (stating in dicta that "it is likely" that a state

agency would not have to show active supervision but that "we do not here decide that issue")).[6]

Petitioners timely filed a petition for hearing and a suggestion of rehearing *en banc*, which raised the issues presented here. The Fifth Circuit denied those petitions on June 3, 1998.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT LACKED JURISDICTION TO ENTERTAIN RESPONDENTS' INTERLOCUTORY APPEAL FROM THE DISTRICT COURT'S DENIAL OF THEIR MOTION TO DISMISS BASED ON THE STATE ACTION EXEMPTION.

This case presents an important jurisdictional issue on which the Circuits are split. The court below asserted jurisdiction over respondents' interlocutory appeal from the trial court's denial of a motion to dismiss based on the *Parker* state action doctrine. The panel was bound by Fifth Circuit precedent holding that denials of state action immunity satisfy the requirements for collateral order review. *See* Pet. App. 5a & n.6 (citing *Martin*, 86 F.3d 1391). Respondents, however, will have a full opportunity to assert their supposed entitlement to the state action exemption on appeal from a final judgment. Asserting jurisdiction over this appeal, the court below ignored the distinctions between immunities from suit and mere exemptions from liability, such as the *Parker* doctrine. The state action exemption is becoming an increasingly prominent source of legal controversy, as the fed-

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[6] The panel in the instant case also held that the Eleventh Amendment compelled dismissal of petitioners' constitutional claims but that those claims could proceed against the individual defendants pursuant to *Ex parte Young*, 209 U.S. 123 (1908). *See* Pet. App. 5a-14a. The Fifth Circuit's Eleventh Amendment holding was incorrect under this Court's precedents, but that holding has little practical effect given the survival of the claims against the individual defendants. Accordingly, petitioners raise no issue relating to their constitutional claims.

eral government continues to intensify enforcement of the antitrust laws while also delegating increased regulatory authority to the states. This Court should grant the petition to prevent an unfounded broadening of federal appellate jurisdiction.

A. The Fifth Circuit's Finding That a Denial of State Action Immunity Satisfies the Collateral Order Doctrine Exacerbates a Split Among the Circuits.

"Finality as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick v. United States,* 309 U.S. 323, 324 (1940). In *Cohen,* 337 U.S. 541, this Court recognized that bypassing the final judgment rule is appropriate in a "small class" of cases in which, after final judgment, "it will be too late effectively to review the present order and the rights conferred by [§ 1291], if it is applicable, will have been lost, probably irreparably." *Cohen* 337 U.S. at 546. In order to fall within the *Cohen* exception, "[1] the order must conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978) (citing *Cohen,* 337 U.S. at 546).

The Fifth Circuit's assertion of jurisdiction over interlocutory appeals from denials of state action immunity in *Martin* and in this case conflicts squarely with a decision of the Sixth Circuit. That court found the collateral order doctrine inapplicable to a denial of state action immunity. *See Huron Valley Hosp. v. Pontiac,* 792 F.2d 563 (6th Cir.), *cert. denied,* 479 U.S. 885 (1986). In *Huron,* the plaintiffs raised claims under the Sherman Act and § 1983. Defendants moved for summary judgment, asserting the state action exemption and qualified immunity, and took an immediate appeal from the district court's denial of their motion. The Sixth Circuit

rejected the qualified immunity claim[7] and held that it lacked jurisdiction to hear the state action claim. *See Huron*, 792 F.2d at 567-68. In applying the *Cohen* test, the court found that the district court's denial of state action immunity could be effectively reviewed following final judgment. The court also held that the determinations whether the activity at issue was "affirmatively expressed as state policy" and whether the "state actively supervise[d it]" were "intimately intertwined" with the merits of the claim. *See id.* at 567.

The Fifth Circuit in *Martin* dismissed the contrary holding of *Huron* as mere "dicta" and "inapposite" to the Sixth Circuit's ruling, *Martin*, 86 F.3d at 1396, implying that no reason existed for the *Huron court* to have addressed the state action issue once it had denied qualified immunity. That is incorrect. Even though a defendant may be unlikely to "violate clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), while acting pursuant to a "clearly articulated and affirmatively expressed state policy," *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54 (1982), that cannot affect a jurisdictional determination. This Court made clear last Term that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1010 (1998). The defendants in *Huron* had a colorable state action immunity claim even after the Sixth Circuit denied them qualified immunity; accordingly, the Sixth Circuit's denial of *Cohen* jurisdiction over the state action claim squarely conflicts with the Fifth Circuit's assertion of *Cohen* jurisdiction in *Martin* and in this case.[8]

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[7] An appeals court may review a denial of qualified immunity prior to final judgment. *See Mitchell*, 472 U.S. at 526-28; *see also infra* Section I.B.

[8] The Eleventh Circuit has reached the same conclusion as the Fifth Circuit. *See TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, 1563 n.1 (11th Cir.), *modified on reh'g*, 86 F.3d

The Fifth Circuit's approach is also in considerable tension with several other Circuits' practice of hearing interlocutory appeals from denials of state action immunity only after the district court has certified the state action question under 28 U.S.C. § 1292(b).[9] *See Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987); *LaSalle Nat'l Bank v. DuPage County*, 777 F.2d 377 (7th Cir. 1985); *Cataline Cablevision Assocs. v. City of Tucson*, 745 F.2d 1266, 1267 (9th Cir. 1984); *Grendel's Den, Inc. v. Goodwin*, 662 F.2d 88 (1st Cir.), *aff'd en banc*, 662 F.2d 102 (1st Cir. 1981), *affd. sub nom. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). The very fact that defendants would seek, and district courts would consider, certification pursuant to § 1292(b) is a powerful indication that the denial of state action immunity is not generally considered appealable as of right. This Court has recognized that the availability of review under § 1292(b) counsels against expanding other avenues for interlocutory appeals. *See, e.g., Swint v. Chambers County Comm'n*, 514 U.S. 35, 45-47 (1995); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 (1994) ("In preserving the strict limitations on review as a right under § 1291, our holding should cause no dismay, for the law is not without its safety valve," *i.e.*, § 1292(b)). The Circuits that have used § 1292(b) to determine the appropriateness of interlocutory appeals from denials of state action immunity have effectuated the policy balance expressed in the jurisdiction statutes. The Fifth Circuit's flat extension of *Cohen* jurisdiction to such appeals upends that balance.

1028 (11th Cir. 1996); *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609, 611 (11th Cir. 1995).

[9] 28 U.S.C. § 1292(b) permits a trial court to certify an interlocutory order for appeal upon making three findings: (1) "such order involves a controlling question of law"; (2) "as to which there is a substantial ground for a difference of opinion"; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

B. The Fifth Circuit's Assertion of Appellate Jurisdiction Conflicts With This Court's Precedents.

This Court has held denials of certain immunities amenable to interlocutory appeal under *Cohen*. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity); *Mitchell*, 472 U.S. at 526-28 (qualified immunity); *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (Eleventh Amendment immunity). In each jurisdictional analysis, the pivotal factor has been this Court's determination whether the immunity at issue accorded a right not to stand trial. *See, e.g., Mitchell*, 472 U.S. at 525 ("the heart of the issue before us is the question whether qualified immunity . . . is in fact an entitlement not to stand trial under certain circumstances"). Such a right by definition would be "effectively lost" if appeal were postponed until after final judgment. *Id.* at 526-27. In contrast, if courts asserted *Cohen* jurisdiction over denials of mere defenses to liability, then § 1291 would be undermined. To prevent erosion of the finality principle, "§ 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equip. Corp.*, 511 U.S. at 873-74; *cf. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993) (refusing to extend heightened pleading requirement to § 1983 claims against counties because the argument for doing so "wrongly equates freedom from liability with immunity from suit").

This Court has allowed *Cohen* jurisdiction over denials of absolute, qualified, and Eleventh Amendment immunities because those immunities afford defendants a right not to stand trial. *See Nixon*, 457 U.S. at 745 (an official " 'should not be under an apprehension that the motives that control his official conduct may . . . become the subject of inquiry in a civil suit' ") (quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896)); *Mitchell*, 472 U.S. at 526 ("[t]he entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to

go to trial"); *Puerto Rico Aqueduct*, 506 U.S. at 146 (" 'The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the insistence of private parties.' ") (quoting *In re Ayres*, 234 U.S. 443, 505 (1887)). Not simply the prevention of legal liability but the fear of " 'subjecting officials to the risks of trial,' " *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 816), or causing "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," *Puerto Rico Aqueduct*, 506 U.S. at 146 (internal quotation marks and citation omitted), drove the Court's extension of *Cohen* jurisdiction to those immunities.

The Fifth Circuit in *Martin*, whose holding bound the panel in this case, attempted to analogize the *Parker* state action exemption to the immunities to which this Court has extended *Cohen* jurisdiction. But the *Martin* court cited no authority for its assertion that *Parker* bars subjecting state officials to trial, and none exists. Indeed, the Fifth Circuit in this case repeatedly characterized the *Parker* doctrine as "[t]he state-action *exemption* from federal antitrust *liability*." Pet. App. 14a (emphasis added). The *Parker* exemption serves not to shield certain defendants from trial but rather to preserve "the States' ability to regulate their domestic commerce." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985). This purpose lacks the deep constitutional or common law roots of absolute or qualified immunity. It simply reflects this Court's routine presumption, in interpreting the Sherman Act and other federal antitrust statutes, of congressional solicitude for federalism. In *Parker*, 317 U.S. at 350-51, this Court read the Sherman Act as not intended "to restrain a state or its officers or agents from activities directed by its legislature." That interpretation was based upon "the language" and "history" of the Act, *id.* at 350, and was elucidated by this Court's recognition that within a federal system consisting of sovereign states, "an unexpressed purpose to nullify a state's

control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351. *Parker*, despite its popular label as an "immunity" doctrine, is a classic example of an exemption from liability. *Cf. Swint*, 514 U.S. at 43 (finding that local government immunity under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), is a "mere defense to liability" and thus fails to satisfy *Cohen*).

The Fifth Circuit in *Martin* also attempted to support its holding by analogizing state action immunity to Eleventh Amendment immunity, the denial of which is immediately appealable under *Puerto Rico Aqueduct*. *See Martin*, 86 F.3d at 1395-96 ("[o]ne of the primary justifications of state action immunity is the same as that of Eleventh Amendment immunity"). As noted above, however, the *Parker* exemption simply reflects this Court's belief that Congress, not having said otherwise, intended in drafting the antitrust laws to assign regulatory responsibility based on principles of federalism. Nothing in *Parker* or its progeny suggests the sort of "dignitary" concern for state sovereignty, directly compelled by the Constitution, that animated this Court's decision in *Puerto Rico Aqueduct*. Indeed, the availability in some cases of *Parker* protection to political subdivisions and even private parties precludes any argument that the *Parker* exemption is meant to protect States' dignitary interests.

Denials of state action immunity also fail to satisfy the latter two *Cohen* prongs. First, such denials do not "conclusively determine the disputed question." *Coopers & Lybrand*, 437 U.S. at 469. Denials of state action immunity often are "tentative, informal or incomplete." *Cohen*, 337 U.S. at 546. A denial of state action immunity is subject to revision in the district court, particularly as more information becomes available to the court. *Cf. Swint*, 514 U.S. at 42 (a finding that county officials "*May have been*" policymakers is not final because district court could reconsider finding) (emphasis added).

Second, and closely related, denials of state action immunity "involve[] considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand*, 437 U.S. at 469 (internal quotation marks and citation omitted). Whether an actor is entitled to state action immunity depends entirely on a factual determination whether the *Midcal* requirements are satisfied. The question whether the defendant is pursuing a "clearly articulated and affirmatively expressed state policy," *Community Comm. Co.*, 455 U.S. at 54, may require significant investigation. *See FTC v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987) (Breyer, J.) ("[w]e . . . must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of a 'clearly articulated and affirmatively expressed' state policy"). The second *Midcal* requirement, that the state "must supervise actively" the activity at issue, *Southern Motor Carriers*, 471 U.S. at 57, requires an additional detailed factual inquiry. *See, e.g., Monahan*, 832 F.2d at 690.[10]

For these reasons, this Court should grant the petition.

II. THE FIFTH CIRCUIT'S DETERMINATION THAT RESPONDENTS SATISFIED THE "CLEAR ARTICULATION" REQUIREMENT FOR THE STATE ACTION EXEMPTION DIRECTLY CONTRAVENES THIS COURT'S PRECEDENTS AND DECISIONS OF OTHER CIRCUITS.

The Fifth Circuit's decision warrants review for a second, independent reason: it casts a long, complicating shadow over the substance of the *Parker* state action doctrine. The Fifth Circuit ignored this Court's foundational precedent of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and found immunity in this case on the apparent assumption that subsequent precedents had

[10] The Fifth Circuit's holding in the instant case that the board need not satisfy the *Midcal* "active supervision" requirement, Pet. App. 17a, was contrary to the approaches of other Circuits and inconsistent with this Court's precedents. *See infra* Part III.

overruled *Goldfarb* implicitly. If *Goldfarb* is no longer good law, this Court should make that pivotal development explicit. If, more plausibly, the Fifth Circuit misapplied this Court's precedents, review of this case may serve to clarify those precedents and to reaffirm the vitality of *Goldfarb*.

A. The Purpose and Effect of the Board's Actions Against Petitioners Is To Fix Prices for Accounting and Financial Services in Louisiana.

The context for this case is provided by this Court's admonition that "[t]he preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992); *see also National Society of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692-93 (1978). Because this case never has advanced beyond the motion-to-dismiss stage, petitioners' allegations must be accepted as true, and all reasonable inferences from the pleadings must be drawn in petitioners' favor. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Thus, petitioners do not need to show that the board's challenged actions violate the antitrust laws. Even so, the first prong of the *Midcal* test requires courts to measure what a state-created entity does against what the State has authorized it to do. Petitioners therefore will outline the basis for their allegation that the board's application and enforcement against them of its rules on commissions and incompatible occupations has nothing to do with the board's authorized regulatory scope but rather amounts to price fixing.

The issues in this case arise in a context of profound change that has transformed the practice of accounting. The traditional core of public accounting practice is the "audit and attest" function, in which "a CPA reviews financial statements and attests that they have been prepared in accordance with generally accepted accounting principles and present a fair and accurate picture of the firm's financial condition." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). As this Court has observed, the CPA's

core function involves a "*public* relationship transcending any employment relationship with the client." *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1985) (emphasis added). To ensure the integrity of this public function, the CPA must "maintain total independence from the client at all times." *Id.*

Many CPAs, however, now focus principally on providing tax and financial planning services to their clients. These services do not involve a public attest function, and the CPA's ethical duty in providing them is one of objectivity toward the client.[11] To give consumers the efficiencies of "one-stop shopping," thousands of CPA financial planners have obtained securities brokerage licenses, thereby allowing consumers to make investments through their financial planners. Petitioners, in addition to their tax and accounting practices, are licensed to sell securities through H.D. Vest Investment Securities, Inc., a broker-dealer licensed with the National Association of Securities Dealers, and are fully regulated as securities brokers at the state and federal levels. Petitioners receive compensation for their securities sales in the form of commissions, which they always disclose in writing to the client. Amended Compl. ¶¶ 26, 39, 45. None of the petitioners has performed any attest functions for any client for whom he has helped purchase securities. Amended Compl. ¶ 50. The board never has accused any of the petitioners of an actual impairment of objectivity.

The board's application of its rules to bar petitioners from providing investment services directly restricts price competition. The ban forces the consumer to pay a flat fee—generally a more expensive form of reimbursement than commissions—to get financial advice from a CPA,

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[11] The Fifth Circuit in this case mistakenly held that "[t]he purported justification for [the incompatible occupations and commissions rules] is the preservation of the *independence* of CPAs." Pet. App. 5a & n.4 (emphasis added). The requirement of independence has no meaning in the context of the nonattest services at issue in this case. To whatever extent the decision below turned on the court's view of the rules' purpose, the decision was incorrect.

plus an additional fee in the form of a commission to a securities broker in order to act on the CPA's advice. The board's action also denies the consumer the efficient option of obtaining securities brokerage services from the accountant he knows and trusts. The commission ban forces the client to obtain brokerage services from a different, less preferred professional, whom the client must again educate about his finances and with whom he must again establish trust. The board thus protects the economic position of traditional CPA practitioners, who offer flat-fee service, at the expense of consumer welfare. This is precisely the kind of anticompetitive price restraint the antitrust laws are designed to prohibit. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (holding that "[a] refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement," impairs competition).

The American Institute of Certified Public Accountants ("AICPA") formerly had rules like those the board has invoked to prosecute petitioners. The Federal Trade Commission challenged the ban under the antitrust laws ten years ago, and AICPA quickly entered into a consent decree that eliminated it. *See In re American Institute of Certified Public Accountants*, No. C-3297 (before the FTC, 1989).[12] Today, the two major ethical standard setting bodies for the accounting profession—AICPA and the National Association of State Boards of Accountancy ("NASBA")—have concluded, after careful study, that a flat ban on commissions for nonattest services is unnecessary to ensure CPA objectivity. *See* NASBA, Model Code of Professional Conduct, Rule 103 (Mar. 1989); AICPA Professional Standards, Rule 503 & ET Section 102 .03 102-2. The Uniform Accountancy Act and Uniform Accountancy Act Rules, jointly promulgated by NASBA and the AICPA, permit CPAs to accept disclosed commissions from nonattest clients. *See* Uniform Account-

[12] The AICPA consent decree is reproduced at Pet. App. 37a-45a.

ancy Act § 14(m)(3d ed., Jan. 1998). Most States affirmatively permit CPAs to accept commissions for non-attest services.[13]

There is simply no reason for the action the board has taken in this case, other than to fix prices for accounting and financial services. By combining tax, financial planning, and securities brokerage services, petitioners are able to offer consumers lower prices and better service. Thus, petitioners' business innovation has two complementary effects: it increases competition in the markets for accounting and securities services, and it lowers prices in both markets. These effects threaten some traditional CPA practitioners by undermining established methods of doing business. Recognizing that threat, the board stretched two of its ethical rules in an attempt to ban petitioners' conduct—despite the absence of any indication that petitioners ever had served their clients, who demand petitioners' combination of services, with anything less than total objectivity. This Court never has allowed state action immunity to protect any party from liability for such self-interested anticompetitive activity.

B. The Fifth Circuit's Decision Conflicts Squarely With This Court's Decision in *Goldfarb v. Virginia State Bar* and Creates Tension With a Subsequent Decision of the First Circuit.

A State's general grant of authority to regulate professional ethics does not immunize a state agency from Sher-

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[13] *See, e.g.*, Rule of Colorado Bd. of Accountancy (Rule 7.4); Rules of Indiana Bd. of Accountancy (Reg. § 872-1-2-22); Rules of Kansas State Bd. of Accountancy (Rule 74-5-103); Maryland, Title 9, Subtitle 24 (Board of Public Accountancy § .06(E)1); Rule of Minnesota Bd. of Public Accountancy (Regs. § 1100.5800); Rule of North Dakota Bd. of Public Accountancy (Reg. 3-04-06-03); Rule of Ohio Bd. of Public Accountancy (Rule 4701-11-04); Rule of Oklahoma Bd. of Accountancy (Sec. 15-39-5); Rule of South Dakota Bd. of Accountancy (Sec. 20:37:11:04); Rule of Texas Bd. of Accountancy (Reg. § 501.13-.14); Rule of Utah Bd. of Accountancy (§ 58-26-2)(20)(f)); Rule of Vermont Bd. of Accountancy (Reg. 10.2(e) § 10.4); Wisconsin Bd. of Accountancy (Acct. Reg. 1.302).

man Act liability for price fixing. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), a state agency, authorized by the State's Supreme Court to regulate professional ethics, published and enforced minimum fee schedules for attorneys. Facing a Sherman Act challenge by consumers, the agency argued that the state court's ethics codes directed the anticompetitive action and that the agency therefore was entitled to state action immunity. This Court rejected the argument. The Court explained that the fee schedules at most "complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes." *Id.* at 791. The Court left no doubt that something more than a broad grant of regulatory authority was necessary for a state agency to set minimum prices in violation of the Sherman Act.

The vitality of *Goldfarb*'s holding and reasoning are not in question. In *Southern Motor Carriers*, 471 U.S. at 60-61, this Court favorably discussed *Goldfarb*'s emphasis on "the source of the anticompetitive policy"—whether the State actually had authorized the agency's action.[14] Indeed, the *Southern Motor Carriers* Court's gloss on *Goldfarb* reiterated that "Virginia 'as sovereign' did not have a 'clearly articulated policy' designed to displace price competition among lawyers," *id.*, and that no such policy could be inferred from a general directive to regulate a profession in the public interest. Similarly, this Court has reaffirmed *Goldfarb's* maxim that "for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion) (discussing *Goldfarb*).

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[14] *Southern Motor Carriers* disavowed what it characterized as ambiguous language in *Goldfarb* suggesting that a state agency could claim state action protection only if the State "compelled" its anticompetitive action. *Southern Motor Carriers*, 471 U.S. at 60-61. That language was immaterial, however, because *Goldfarb* "would have reached the same result" under the clear articulation requirement. *Southern Motor Carriers*, 471 U.S. at 61.

The Fifth Circuit's decision in this case can be upheld only if *Goldfarb* is no longer good law. The decision below permitted exactly what *Goldfarb* foreclosed: price fixing under the guise of ethical regulation, pursuant to no legislative authorization other than a broad, general grant to regulate a profession. Certainly the state authorization in *Goldfarb*, like the Accountancy Law in this case, contemplated some anticompetitive consequences from ethical regulation. Any prohibition of unethical activities will, in an abstract sense, affect prices. The *Goldfarb* Court, however, drew a clear line: a state board's purported ethical regulation that prevents price reductions cannot stand without some specific legislative authorization to regulate prices. The Fifth Circuit dealt with *Goldfarb* by pretending it did not exist, citing it only in a single footnote that listed state action cases. *See* Pet. App. 14a n.9.

The decision of the Court of Appeals is also in tension with a decision of the First Circuit that applied the reasoning of *Goldfarb*. In *Monahan*, 832 F.2d 688, the Massachusetts Board of Registration in Pharmacy had promulgated rules prohibiting certain services and restricting advertising by pharmacists. Confronted with a federal antitrust investigation, the board claimed state action immunity based on the State's authorization for the board to regulate pharmacy services and advertising. The First Circuit denied the claim because "we do not know for sure that [regulation] is all that the Board is doing." *Id.* at 689. The legislature's authorization for the board to regulate pharmacy advertising and services "d[id] not permit the Board, under the guise of regulation, and without legitimate purpose, simply to raise consumer prices." *Id.* at 689. The authorization to regulate in *Monahan* clearly had some foreseeable anticompetitive consequences, such as preventing new businesses from using unrestricted advertising to penetrate the market. But the First Circuit, following *Goldfarb*, found that the State had not authorized the board to restrict price competition. *Monahan* recognized that a general delegation of regulatory author-

ity to an agency does not suffice to insulate the agency's every action from federal antitrust liability.

C. The Decision Below Disregarded the Legal Standard This Court's Precedents Prescribe for Assessing State Action Claims.

The decision below ignored the standards this Court has articulated for "clear articulation" under *Midcal*. When Congress enacted the Sherman Act, it "sought to establish a regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette*, 435 U.S. at 398. The state action doctrine, designed "to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace," *Southern Motor Carriers*, 471 U.S. at 61, represents a limited exception to the paramount national policy of free market competition. This Court has made clear that "state action immunity is disfavored, much as are repeals by implication." *Ticor*, 504 U.S. at 636.

The state action exemption only applies to "a State, in the exercise of its sovereign powers." *Community Comm. Co.*, 455 U.S. at 48. When a state legislature acts directly to restrain competition, no more is needed to invoke the exception. But "closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization." *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984) (footnote omitted).

A State that wants to let its subdivisions pursue an anticompetitive policy must " 'clearly articulate[] and affirmatively express[]' " a policy " 'to displace competition with regulation or monopoly public service.' " *Community Comm. Co.*, 455 U.S. at 51 (quoting *City of Lafayette*, 435 U.S. at 410, 413 (plurality opinion)); *see also Midcal*, 445 U.S. at 105. In addition, the particular anticompetitive consequences of the subdivision's action must be "the 'foreseeable result' " of the legislative grant of authority to displace competition. *City of Columbia*

v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 373 (1991) (*quoting Town of Hallie*, 471 U.S. at 42). The state authorization must make "clear that anticompetitive effects logically would result" and that "the legislature contemplated *the kind of action complained of*." *Town of Hallie*, 471 U.S. at 42, 44 (quoting *City of Lafayette*, 435 U.S. at 415 (internal quotation marks omitted; emphasis added)).

The requirement of a clearly articulated policy is a "rigorous" one, *Patrick v. Burget*, 486 U.S. 94, 100 (1988), meant to ensure that the law's effort to accommodate federalism does not provide a cloak for self-interested market actors to abuse delegated state authority. Accordingly, "the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the . . . actions challenged as anticompetitive." *Community Comm. Co.*, 455 U.S. at 55 (emphasis added); *see also Town of Hallie*, 471 U.S. at 43. A State need not "express[ly] authoriz[e] every action that an agency might find necessary to effectuate state policy," *Southern Motor Carriers*, 471 U.S. at 64, but it must grant "authority to suppress competition." *Omni*, 499 U.S. at 372. A mere general authorization to regulate a profession or field is not enough. "Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression.'" *Community Comm. Co.*, 455 U.S. at 56.

The court of appeals did not follow this law. The only sources of "clearly articulated state policy" the panel identified to support the board's immunity claim were the Accountancy Law's general authorizations for the board "to regulate the practice of public accounting in the state of Louisiana in the interest of and to preserve and protect the public health, safety and welfare," La. Rev. Stat. Ann. § 37:75(A)(3), and to promulgate rules of professional conduct. La. Rev. Stat. Ann. § 37:75(B)(2); *see*

Pet. App. 18a-21a. Those authorizations, however, do not articulate the kind of policy to displace price competition that this Court's precedents would require to sustain the board's claim of *Parker* immunity. The court of appeals incorrectly asserted that the only alternative to its analysis was "[requiring] the Louisiana legislature to expressly state an intention to displace competition in the accounting profession by restricting the practice of 'incompatible professions' and the acceptance of commissions." Pet. App. 21a. But the real alternative, which the panel ignored, is the analysis this Court has prescribed: inquiring whether the legislature clearly articulated a policy of which the board's particular anticompetitive action—here, regulating price competition—was a reasonably foreseeable consequence. Had the panel made that inquiry, as this Court's precedents require, it could not have reached the result it did. The decision below empowers the board to set fixed price schedules, divide the market among competitors in any way it sees fit, or grant monopoly franchises to individual CPA firms. Indeed, on the court of appeals' view, the more diffuse and ambiguous the legislature's grant of authority, the broader the scope of the board's authority to act anticompetitively.

The court below pronounced its decision "faithful to the principles of federalism that gird the state-action doctrine." Pet. App. 22a. That is not so. Federalism requires that States be able "to *implement* through state agencies *their* anticompetitive policies." *Southern Motor Carriers*, 471 U.S. at 64 (emphasis added). Federalism serves the sovereign States, not subordinate state instrumentalities. As this Court recently and pointedly explained, "[i]f the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it." *Ticor*, 504 U.S. at 635. Lax application of the clear articulation requirement subverts the sovereign authority of the States to regulate as they see fit. "Federalism serves to assign political responsibility, not to obscure it. Neither fed-

eralism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends." *Id.* at 636.

Nothing in *Omni* or *Town of Hallie* can save the Fifth Circuit's analysis. Those cases differed from this Court's other state action precedents and from the instant case in two critical respects. First, they involved express delegations of authority over property. Second, they involved municipalities rather than state agencies. In *Omni*, state statutes specifically granted municipalities zoning authority over land use and construction. As this Court explained, "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Omni*, 499 U.S. at 373. Indeed, the inevitable consequence of zoning laws is that some entities will not be able to use or acquire property in the way they wish to. Accordingly, the city was immune from federal antitrust liability for restricting construction of new billboards. Similarly, in *Town of Hallie*, the State explicitly authorized municipalities "to provide sewerage services and also to determine the areas to be served." *Town of Hallie*, 471 U.S. at 42. This Court held that grant of authority "clearly contemplate[d] that a city may engage in anticompetitive conduct" and that "[s]uch conduct is a foreseeable result" of such authority. *Id.* Accordingly, the Court held the city immune from a challenge by neighboring towns to its monopoly over area sewerage services. The municipalities in *Omni* and *Town of Hallie* had express authority to control markets. The board, a mere state regulatory entity, would need at least that degree of authorization to validate its state action claim.

The tension between the decision below and the Ninth Circuit's recent decision in *Columbia Steel Casting Co. v. Portland General Electric Co.*, 111 F.3d 1427 (9th Cir. 1996), is instructive. In *Columbia Steel*, a consumer alleged that two public utilities' establishment of exclusive

service territories had violated § 1 of the Sherman Act. One of the utilities claimed state action immunity, arguing that an order of the Oregon Public Utilities Commission ("OPUC"), which expressly permitted the two utilities to exchange plants and property, had clearly articulated a state policy to permit exclusive service territories. The Ninth Circuit held that OPUC's order had not authorized exclusive territories with sufficient clarity to constitute "clear articulation" under *Midcal*. *See Columbia Steel*, 111 F.3d at 1437-40. There was no dispute that OPUC had legislative authorization to permit exclusive service territories, and OPUC's order plainly authorized some measure of anticompetitive conduct. But the Ninth Circuit, tracking this Court's precedents, rejected the utility's immunity claim because OPUC had not expressly authorized exclusive service territories. The utilities' arrangement simply strayed too far from the anticompetitive conduct OPUC had authorized to be a foreseeable consequence of that authorization. The same analysis could not have produced the result reached in the instant case.

This Court should grant the petition in order to confirm and clarify the rigorous showing of "clear articulation" that it consistently has required for nonsovereign state subdivisions to claim state action immunity.

III. THE FIFTH CIRCUIT'S REFUSAL TO APPLY THE "ACTIVE SUPERVISION" REQUIREMENT FOR STATE ACTION IMMUNITY CONFLICTS WITH THE APPROACH TAKEN BY OTHER CIRCUITS AND PRESENTS AN IMPORTANT QUESTION RESERVED BY THIS COURT.

This Court should grant review to decide the issue, left open in *Town of Hallie*, whether state agencies must show "active supervision" of their anticompetitive actions in order to claim *Parker* immunity, and to settle the conflicting approaches the Circuits have taken to resolving that issue.

This Court ordinarily exempts a nonsovereign actor from federal antitrust liability only when the challenged

action is " 'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105 (quoting *City of Lafayette*, 435 U.S. at 410 (plurality opinion)). The active supervision requirement serves an "evidentiary function [of] ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie*, 471 U.S. at 46. Thus, it ensures that "[t]he national policy in favor of competition cannot be thwarted by casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106; *see also Patrick*, 486 U.S. at 101. In this case, the court of appeals made clear that the board could not satisfy the active supervision requirement. *See* Pet. App. 16a n.10 ("[The board's] rulemaking process was not actively supervised."). Thus, if the board was required to show active supervision, its state action immunity claim would fail. *Id.*

The court of appeals, however, held that the board was "fortunate" enough to be exempt from the active supervision requirement, citing a Circuit precedent that had held the requirement inapplicable to state agencies. *See id.* 16a-17a (*citing Benton*, 897 F.2d at 203). That precedent, in turn, offered no analysis of the issue but simply adopted the district court's decision, which treated as binding this Court's statement in *Town of Hallie* that "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required." *Town of Hallie*, 471 U.S. at 46 n.10; *see Benton*, 897 F.2d at 203. But that statement was dicta: the *Town of Hallie* Court stated that "we do not here decide that issue." 471 U.S. at 46 n.10. *Town of Hallie* held that municipalities need not show active supervision because "there is little or no danger that [a municipality] is involved in a private price-fixing arrangement." *Town of Hallie*, 471 U.S. at 47; *see also* Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 502 (1987) (explaining that municipalities often must act like sovereigns, performing regulatory functions independent of the State).

But this Court never has considered whether those characteristics of municipalities extend to state boards or agencies.

The court below did not analyze whether this board should be exempt from the "active supervision" requirement. Rather, it made a categorical judgment that no state agency ever need show active supervision. *See* Pet. App. 16a (relying on nothing more than "the public nature of the Board's actions" to dismiss danger of willful anticompetitive action). That judgment directly contradicts the approach taken in other Circuits, which have adopted a case-by-case approach, focusing on whether state statutes bind the agency to execute the sovereign's policy and thus prevent other interests from clouding its acts. *See Crosby v. Hospital Authority*, 93 F.3d 1515, 1524-25 (11th Cir. 1996) (inquiring "whether the nexus between the State and the [agency] is sufficiently strong that there is little real danger that the [agency] is involved in a private price-fixing arrangement"), *cert. denied*, 117 S. Ct. 1246 (1997); *Hass v. Oregon State Bar*, 883 F.2d 1453, 1460-61 & n.4 (9th Cir. 1989) (granting a professional board immunity largely because state law required several members of the challenged agency *not* to be members of the regulated profession); *Monahan*, 832 F.2d at 689-90 ("Whether any 'anticompetitive' Board activities are 'essentially' those of private parties depends upon how the Board functions in practice, and perhaps on the role played by its members who are private pharmacists.") (quoting *Midcal*, 445 U.S. at 106); *Hybud Equipment Corp. v. City of Akron*, 742 F.2d 949, 964 (6th Cir. 1984) ("The court should give close scrutiny to the existence of supervision where the circumstances indicate the possibility of an improper exercise of [state] power.").[15]

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[15] The Tenth Circuit in *Porter Testing Laboratory v. Board of Regents*, 993 F.2d 768 (10th Cir. 1993), appears to have joined the Fifth Circuit in adopting a strict, categorical rule that state agencies are exempt from the active supervision requirement, although the Tenth Circuit held in the alternative that the defendants had established active supervision. *See id.* at 772-73. *Cine 42nd*

Holding this board to the active supervision requirement is singularly appropriate. The court below held that "the Board is functionally similar to a municipality" because "the public nature of the Board's actions means that there is little danger of a cozy arrangement to restrict competition." Pet. App. 16a-17a. The makeup of the board, however, creates precisely that danger. Board members are appointed by the governor from a list of recommendations by the Louisiana Society of Certified Public Accountants. La. Rev. Stat. Ann. § 37:73(E). Thus, they need not answer for their policies to the voters or consumers of Louisiana, but they owe a great debt to the professional establishment. *Cf.* William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 Duke L.J. 618, 635-36 (1987) (describing how various factors, including role of regulated entities in agency appointments, causes state regulators to favor interests of regulated entities). Moreover, state law requires the board to raise its own operating revenues, denying it access to state funds. La. Rev. Stat. Ann. § 37:76. This budgetary framework inevitably leads the board to elevate the interests of its patrons—Louisiana CPAs—over other interests, including those of consumers. Most important, the Act requires all the board members to be practicing CPAs. La. Rev. Stat. Ann. § 37:73(A). The members' dual role as regulators and market actors compels critical scrutiny of any attempts they make to control the price and supply of accounting services, areas over which the legislature chose not to give the board regulatory authority.

The need for intensified scrutiny in this case is confirmed by widely recognized economic research suggesting that regulatory boards can be "captured" by the in-

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Street Theater Corp. v. Nederlander Organization, 790 F.2d 1032 (2d Cir. 1986), the other decision cited by the court below, exempted from the active supervision requirement a statutory political subdivision of the State, *see id.* at 1047, which was like a municipality and unlike the board here.

dustry they regulate, resulting in regulations that favor a particular private interest rather than the public interest.[16] Such regulations can favor a particular segment of an industry at the expense of consumers and competitors, and can be used to subvert competition. A regulatory board captured by market participants can impose particularly effective anticompetitive restrictions. It does not need individual market power to enforce such restrictions—it does so by fiat—and market forces cannot overcome them.[17] The activities of captured boards are particularly pernicious because they can camouflage anticompetitive actions, taken to serve private interests, behind rules of ethics or standards for professional conduct.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[16] *See* George J. Stigler, *The Theory of Economic Regulation*, 2 Bell. J. Econ. 3 (1971); Richard A. Posner, *Taxation by Regulation*, 2 Bell. J. Econ. 22 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & Econ. 211 (1976); Lee Benham and Alexandra Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J. L. & Econ. 421 (1975).

[17] *See* William J. Baumol and Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & Econ. 247 (1985); Page, *supra*, at 636 & n.110.

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APPENDIX A

[Filed Apr. 24, 1998]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30159

KENNETH DON EARLES; ALBERT R. LEGER;
JOSEPH MICHAEL SLEDGE,
Plaintiffs-Appellees,

versus

STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANTS OF LOUISIANA; MILDRED W. MCGAHA, CPA; L. PAUL HOOD, CPA; LEON K. POCHE, CPA; LAWRENCE W. STOULIG, JR., CPA; DONALD L. MOORE, CPA; W. THERON ROBERTS, CPA; MICHAEL A. THAM, CPA; SUSAN C. COCHRAN, CPA; J. GORDON REISCHE,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before GARWOOD, DUHÉ and DEMOSS, Circuit Judges.

DEMOSS, Circuit Judge:

Rules promulgated by the State Board of Certified Public Accountants of Louisiana prohibit CPAs from accept-

ing commissions and engaging in the practice of so-called "incompatible professions." These rules apply to Louisiana's CPAs and have been used to prevent the three plaintiffs in this lawsuit from carrying out their accounting practices while simultaneously selling securities. The plaintiffs sued the Board and its individual members, seeking to block the enforcement of these rules.

The defendants filed a motion to dismiss the lawsuit, claiming immunity from suit (1) under the Eleventh Amendment and (2) under the state-action exemption doctrine of federal antitrust laws. The motion was denied, and the defendants now seek interlocutory review. The Board is entitled to Eleventh Amendment immunity; however, the federal claims against the Board's individual members may proceed under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Finally, the state-action doctrine does block scrutiny of the Board's rules under federal antitrust laws. Accordingly, we affirm in part, reverse in part, and remand the matter with instructions for further proceedings in the district court.

I. Factual and Procedural Background

A. *The Plaintiffs*

Kenneth Don Earles, a CPA, has practiced as an accountant in Crowley, Louisiana since 1969. Beginning in 1987, he obtained the licenses necessary to become a securities broker and began practicing as a broker-dealer licensed with H.D. Vest Investment Securities, Inc. Mr. Earles earns commissions from his sales of securities. His securities business is kept separate from his accounting business, with separate books, records, and bank accounts.

In October 1988, the Board of Certified Public Accountants of Louisiana notified Mr. Earles that it considered his practice of concurrently acting as a CPA and a securities broker to be a violation of the Board's rules

pertaining to "incompatible occupations" [1] and "receipt of commissions." [2] A series of communications ensued between the Board and Mr. Earles, culminating in a March 1990 administrative hearing on the Board's complaint.

In August 1990, the Board issued its decision finding Mr. Earles in violation of the rule proscribing the practice of incompatible occupations. Mr. Earles's future certification and licensure as a CPA were expressly conditioned upon cessation of his securities business. Mr. Earles responded by filing this lawsuit against the Board and its individual members in federal court. He also sought judicial review of the Board's decision in state court.

The federal suit was stayed pending state-court review.[3] In state court, the Board's ruling was initially overturned but later reinstated on appeal. *See Earles v. State Bd. of*

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[1] The incompatible occupations rule provides:

> A licensee shall not concurrently engage in the practice of public accountancy and in any other business or occupation which impairs his independence or objectivity in rendering professional services, or which is conducted so as to augment or benefit the accounting practice, unless these rules are observed in the conduct thereof.

LA. ADMIN. CODE tit. 46, § XIX.501(E) (Sept. 1997) <www.state.la.us/osr/lac/lac.htm>.

[2] The rule against receiving commissions provides:

> A licensee shall not pay a commission to obtain a client or accept a commission for a referral to a client of products or services of others. This rule does not prohibit payments for the purchase of all, or a part, of an accounting practice, or retirement payments to persons formerly engaged in the practice of public accountancy, or payments to the heirs or estates of such persons.

LA. ADMIN. CODE tit. 46, § XIX.501(C) (Sept. 1997) <www.state.la.us/osr/lac/lac.htm>.

[3] *See Earles v. State Bd. of Certified Pub. Accountants*, 1992 WL 10329 (E.D. La. Jan. 16, 1992) (abstaining from further proceedings pursuant to the doctrine of *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941)).

Certified Pub. Accountants, 665 So. 2d 1288 (La. Ct. App. 1995), *writ denied*, 669 So. 2d 397 (La. 1996).

In August 1996, after Mr. Earles had exhausted his remedies in state court, the federal suit was reactivated. Soon thereafter, two additional plaintiffs joined the suit—Albert R. Leger, who had practiced as a CPA in Marksville, Louisiana since 1975, and Joseph Michael Sledge, who had practiced as a CPA in Shreveport, Louisiana since 1975. Like Mr. Earles, both Mr. Leger and Mr. Sledge are licensed securities brokers affiliated with H.D. Vest. Each also keeps his securities-related business separate from his accounting practice. In January 1997, Mr. Leger and Mr. Sledge were found by the Board to be guilty of violating the rules against practicing incompatible professions and receiving commissions. They were each fined, and their accounting licenses were revoked.

B. *The Defendants*

The defendants in this lawsuit are the Board of Certified Public Accountants of Louisiana and its individual members in their official capacities. The Board was created by the State of Louisiana for the purpose of licensing public accountants and regulating the profession of public accounting within the state. *See* LA. REV. STAT. ANN. §§ 37:73, 37:75 (West 1988 & Supp. 1998). The Board's seven members are chosen by the governor from a slate of candidates proposed by the Society of Louisiana Certified Public Accountants, and they must be confirmed by the state senate. *See id.* § 37:73 (West 1988).

Among the powers of the Board is the ability to "[a]dopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in the state of Louisiana." *Id.* § 37:75(B)(2). Pursuant to this power, the Board adopted the incompati-

ble-occupations and receipt-of-commissions rules which gave rise to this lawsuit.[4]

II. Appellate Jurisdiction

Pursuant to our precedent applying 28 U.S.C. § 1291 and the collateral order doctrine,[5] we have appellate jurisdiction to consider an interlocutory appeal from the denial of a motion to dismiss based upon immunities bestowed by the Eleventh Amendment and the state-action antitrust exemption. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (denial of Eleventh Amendment immunity is subject to interlocutory review); *Martin v. Memorial Hosp.*, 86 F.3d 1391 (5th Cir. 1996) (denial of the state-action exemption is subject to interlocutory review).[6]

III. Eleventh Amendment Immunity

The United States Constitution provides: "The Judicial power of the United States shall not be construed to ex-

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[4] The purported justification for these rules is the preservation of the independence of CPAs. The Supreme Court has acknowledged that a state's interest in "maintaining CPA independence and ensuring against conflicts of interest" is a substantial one. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

[5] *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) ("To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen* [*v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)], the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.").

[6] At oral argument, the plaintiffs conceded that *Martin* controls the question of appellate jurisdiction over the state-action element of this case. They urged our panel to overrule *Martin*, but this is not an option available to us. It has been well established in this circuit that one panel may not ignore the holding of a previous panel absent intervening authority from the Supreme Court, an en banc decision of our Court, or Congress. *See, e.g., Okoro v. INS*, 125 F.3d 920, 925 (5th Cir. 1997).

tend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Eleventh Amendment thus negates federal jurisdiction over covered suits, including federal suits against a state brought by the citizens of that state. *See Hans v. Louisiana*, 134 U.S. 1 (1890).

Of course, the Board and its members are not the state itself. The scope of the Eleventh Amendment, however, is not limited to suits that name a state as a defendant. *See, e.g., Regents of the Univ. of Cal. v. Doe*, 117 S. Ct. 900, 903 (1997). The Eleventh Amendment bars any suit in which a state is the "real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984); *see also Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). We must thus decide whether the Board and its members satisfy this standard and thereby avoid suit.

A. *The Board*

The Board claims that because it is a "state agency," LA. STAT. REV. ANN. § 37:73(A) (West Supp. 1998), it is entitled to Eleventh Amendment immunity. Federal law controls the Board's eligibility for Eleventh Amendment immunity. *See Doe*, 117 S. Ct. at 904 n.5. State agencies are immunized by the Eleventh Amendment in certain circumstances. *See, e.g., Pennhurst*, 465 U.S. at 100; *Papasan v. United States*, 756 F.2d 1087, 1092 (5th Cir. 1985), *aff'd in part, vacated in part sub nom. Papasan v. Allain*, 478 U.S. 265 (1986). Simply being a political subdivision of a state, however, is not enough. *See Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974). We must look to see whether the entity "in effect, stands in the shoes of the state itself." *Hander v. San Jacinto Junior College*, 519 F.2d 273, 278 (5th Cir.), *modified on other grounds*, 522 F.2d 204 (5th Cir. 1975); *see*

also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (entity must be an "arm of the state"); *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 186 (5th Cir. 1986) (entity must be an "alter ego" of the state). Our analysis must consider the particular nature of the entity, including its powers and duties, the nuances of its organizational structure, and its interrelationship with other organs of the state. *See, e.g., Mt. Healthy*, 429 U.S. at 280; *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 438 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724 (5th Cir. 1982); *United Carolina Bank v. Board of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 557 (5th Cir. Unit A 1982).

There is no simple litmus test that determines whether a state agency is an "arm of the state" for the purposes of Eleventh Amendment immunity. Rather, the matter is determined by reasoned judgment about whether the lawsuit is one which, despite the presence of a state agency as the nominal defendant, is effectively against the sovereign state. In determining whether a given state agency operates as an "arm of the state," our Court has taken many factors into account, including: (1) whether the state, through statutes or case law, views the entity as an arm of the state; (2) the source of the entity's funding; (3) whether the entity is concerned with local or statewide problems; (4) the entity's degree of authority independent from the state; (5) whether the entity can sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. *See, e.g., Voisin's Oyster House*, 799 F.2d at 186-97; *Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir. 1986); *Jacintoport*, 762 F.2d at 438-40; *United Carolina Bank*, 665 F.2d at 557-58; *Huber, Hunt & Nichols, Inc. v. Architectural Stone Co.*, 625 F.2d 22, 24-25 (5th Cir. 1980). Considering these factors, we conclude that a suit against

the Board is, in effect, a suit against the State of Louisiana.

1. *The state's view.*—First, we consider the Board's place in the overall scheme of Louisiana government. The Board is "a state agency within the Department of Economic Development." LA. STAT. REV. ANN. § 37:73(A) (West Supp. 1998). The Department of Economic Development is a department of the executive branch of the government of Louisiana. *See id.* §§ 36:3, 36:4 (West 1985 & Supp. 1998). In this situation, it appears that Louisiana would regard the Board as part of the state. We are compelled to draw this conclusion by our disposition in *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183 (5th Cir. 1986). There, as here, the entity in question was a subdivision of a department of the executive branch. Our Court reasoned:

> According to Louisiana statutes, the Department is a part of the executive branch of the state government, LA. REV. STAT. ANN. § 36:4 (West 1985), and the Commission is part of the Department. LA. REV. STAT. ANN. § 36:610 (West 1985). In its statutes, Louisiana treats all executive departments the same, LA. REV. STAT. ANN. § 36:4(A), and provides that "[n]o suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court." LA. REV. STAT. ANN. § 13:5106(A) (West Supp. 1986). *See Fireman's Fund Insurance Co. v. Department of Transportation and Development*, 792 F.2d 1373 (5th Cir.1986) (holding that a similar executive department had Eleventh Amendment immunity and implying that all Louisiana executive departments have such immunity). The Louisiana Supreme Court has held "[i]f the office is created by the legislature, or is established in the first instance by the constitution, it is a state office." *Mullins v. Louisiana*, 387 So. 2d 1151, 1152 (La. 1980). The Department

> was created by the state legislature, LA. REV. STAT. ANN. § 36:601, and, therefore, the Louisiana courts would view the Department as part of the state.

Voisin's Oyster House, 799 F.2d at 186 (alterations in original). The circumstances encountered in *Voisin's Oyster House* pertaining to that entity's place in Louisiana government are substantially identical to the present case, and we therefore conclude that this factor weighs in favor of Eleventh Amendment immunity.

2. *Source of the entity's funding.*—Next, we consider the source of the Board's funding. In this case, the Board is financially independent from the state. The Board is funded solely by fees collected from accountants. *See* LA. REV. STAT. ANN. §§ 37:80, 37:82 (West 1988 & Supp. 1998); LA. ADMIN. CODE tit. 46, §§ XIX.1911, .2101, .2501 (Sept. 1997) <www.state.la.us/osr/lac/lac.htm>. Moreover, statutes and regulations prohibit the Board from resorting to state coffers for funding. *See* LA. REV. STAT. ANN. § 37:76 (West 1988) ("No expenses incurred by the Board shall ever be charged to or against the funds of the state of Louisiana."); *id.* § 37:75(B)(8) ("The Board may . . . [e]mploy legal counsel to carry out the provisions of this Chapter, provided that the fees of such counsel and the costs of all proceedings, except criminal prosecutions, are paid by the board from its own funds . . . ."); LA. ADMIN. CODE tit. 46, § XIX.903 (Sept. 1997) <www.state.la.us/osr/lac/lac.htm> ("The compensation of board members and all other necessary expense incurred by the board . . . shall be paid out of the treasury of the board."). Thus, the Board is financially independent, and there is no threat that Louisiana will pay money damages to a citizen pursuant to a judgment obtained in federal court. Our examination of this factor weighs against a finding of Eleventh Amendment immunity for the Board.

3. *Scope of the entity's responsibilities.*—The Board is concerned with regulating the practice of public ac-

counting on a statewide, rather than local, scale. *See* LA. REV. STAT. ANN. § 37:75 (West 1988 & Supp. 1998). This factor favors Eleventh Amendment immunity for the Board.

4. *Independence from the state.*—The Board exercises considerable authority independent from the state. The Board has the power to "[a]dopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in Louisiana, to provide for the efficient operation of the board, and to otherwise discharge its duties and powers." LA. REV. STAT. ANN. § 37:75(B)(2) (West 1988). The legislature may review proposed rule changes. *See id.* § 49:968 (West 1987 & Supp. 1998). In the usual case (such as the adoption of the rules at the heart of this lawsuit), however, the Board's proposed rule changes simply take effect without any legislative consideration or action whatsoever. *See id.* § 49:968(H)(1) (if the legislature fails to act on proposed rule changes, the rule may be adopted ninety days after notice is published in the State Register). This factor cuts against Eleventh Amendment immunity.

5. *Capacity to sue and be sued.*—The Board has a limited capacity to sue and be sued. *See, e.g.*, LA. REV. STAT. ANN. §§ 49:963-:965 (West 1987 & Supp. 1998) (authorizing judicial review of Board actions). The Board's power to sue and be sued is not established as plainly as for other similarly situated state agencies in Louisiana. *See, e.g., id.* § 37:1393(A) (West Supp. 1998) (State Licensing Board for Locksmiths "may sue and be sued"); *id.* § 37:3273(A) (West 1988) (Louisiana State Board of Private Security Examiners "may sue and be sued"). The Board does, however, have some power to "sue and be sued" insofar as it has the power to litigate as an independent party. *See, e.g., State Bd. of Certified Pub. Accountants v. Donnelly*, 688 So. 2d 127 (La. Ct. App.), *writ denied*, 694 So. 2d 247 (La.

1997). Ultimately, this is not a case in which the state has granted "express authority to 'sue and be sued, plead and be impleaded' " in the entity's own name, *Huber, Hunt & Nichols,* 625 F.2d at 25 (quoting *Hopkins v. Clemson Agric. College,* 221 U.S. 636, 658 (1911)), so this factor lends slight guidance to our Eleventh Amendment immunity inquiry.

6. *Right to hold and use property.*—The parties have presented conflicting views as to whether the Board has the right to hold and use property. There is no express statutory grant of such power to the board. But on the other hand, the powers that are granted to the Board are so broad that they arguably encompass the right to hold and use property. *See, e.g.,* LA. REV. STAT. ANN. § 37:75(B)(9) (West 1988) ("The board may . . . [i]ncur all necessary and proper expenses . . . ."). Because of this statutory ambiguity, this factor again has little effect on our analysis.

In sum, when we evaluate the mixed indications given by the various factors discussed above, we are led to the conclusion that the Board is entitled to immunity. The question is a close one, but ultimately we are persuaded by the legislature's broad grant of power to a state agency (composed of members who are appointed to serve at the pleasure of the governor) charged with carrying out the governmental function of regulating the practice of public accounting on a statewide basis. We therefore conclude that the Board is entitled to Eleventh Amendment immunity.

B. *Individual Members of the Board*

Though the Board itself is eligible for Eleventh Amendment immunity, it does not follow that the members of the Board may claim immunity for their official actions. The doctrine of *Ex parte Young,* 209 U.S. 123 (1908),

precludes the individual Board members' claims of Eleventh Amendment immunity.

The rule of *Ex parte Young* has been traditionally viewed as establishing that a "federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly or because it is contrary to a federal statute or regulation that is the supreme law of the land." 17 CHARLES ALAN WRIGHT, ET. AL., FEDERAL PRACTICE AND PROCEDURE, § 4232 (2d ed. 1988). Since the filing of the briefs in this case, the Supreme Court has handed down its decision in *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028 (1997). That decision, despite its disclaimer of intent to "question the continuing validity of the *Ex parte Young* doctrine." *Coeur d'Alene*, 117 S. Ct. at 2034, casts some doubt upon previous conventional wisdom in this area.

The Fifth Circuit has not yet had the opportunity to consider the effect of *Coeur d'Alene*, though several other circuits have. *See Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *Marie O. v. Edgar*, 131 F.3d 610, 616 n.10, 617 n.13 (7th Cir. 1997); *Strahan v. Coxe*, 127 F.3d 155, 166-67 (1st Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3605 (U.S. Mar. 6, 1998) (No. 97-1485); *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1183-85 (9th Cir. 1997); *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 124 F.3d 904, 913-14 (8th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3559 (U.S. Feb. 17, 1998) (No. 97-1337). We concur with the consensus among other courts that although the principal opinion in *Coeur d'Alene* suggests a case-by-case (rather than rule-based) approach to the application of *Ex parte Young, see Coeur d'Alene*, 117 S. Ct. at 2038-40 (opinion of Kennedy, J.), this part of the opinion did not muster a majority, and a majority of the Court would continue to apply the rule of *Ex parte*

Young as it has been traditionally understood, *see id.* at 2047 (O'Connor, J., concurring in part and concurring in the judgment (joined by Scalia and Thomas, JJ.)); *id.* at 2048 (Souter, J., dissenting (joined by Stevens, Ginsburg, and Breyer, JJ.)).

The rule of *Ex parte Young* empowers the federal courts to grant the prospective injunctive relief sought by the plaintiffs if the rules challenged in this case do indeed violate federal law. The plaintiffs' state-law claims, however, are not cognizable in a proceeding under *Ex parte Young* because state officials continue to be immunized from suit in federal court on alleged violations of state law brought under the federal courts' supplemental jurisdiction. *See Pennhurst,* 465 U.S. at 103-21; *see also Papasan v. Allain,* 478 U.S. 265, 277 (1986); *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 251 (1985); *Hays County Guardian v. Supple,* 969 F.2d 111, 125 (5th Cir. 1992), *cert. denied,* 506 U.S. 1087 (1993). The *Ex parte Young* doctrine promotes federal sovereignty, but is limited by the constitutional immunity granted to the states by the Eleventh Amendment. *See Pennhurst,* 465 U.S. at 105-06. It therefore does not serve to subject state officials to suit in federal court over alleged violations of state law, as that result does not advance the concerns of *Ex parte Young* and also "conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Id.* at 106. The availability of the supplemental jurisdiction statute does not change this result because that rule arises merely from "a judge-made doctrine of expediency and efficiency derived from the general Art. III language conferring power to hear all 'cases' arising under federal law or between diverse parties." *Id.* at 120 (citing *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966)).

Thus, the plaintiffs' suit may proceed against the individual members of the Board under the doctrine of

Ex parte Young, but the limitations of the doctrine require that the plaintiffs' state-law claims be dismissed upon remand.

IV. State Action Exemption

We now turn to the defendants' state-action defense. The state-action exemption from federal antitrust liability was first recognized in the case of *Parker v. Brown*, 317 U.S. 341 (1943). State action is properly treated as an immunity from suit,[7] and therefore our review of the district court's pretrial rejection of a state-action exemption is appropriate.[8] We begin, as do all of the Supreme Court's opinions on state action,[9] with a look back to *Parker*'s first principles.

In *Parker*, the Court considered the legal effect of the California Agricultural Prorate Act. The California statute permitted regulations—or as they were called, a "marketing program"—designed to protect the raisin industry. One effect of this program was that the freedom of raisin producers to sell their crops in interstate com-

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[7] *See Martin*, 86 F.3d at 1395-96; 3 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 47.01[2] (1997).

[8] *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 565-67 (1984) (reversing the lower court's determination that state-action immunity should not be decided on a Rule 12(b)(6) motion to dismiss).

[9] *See FTC v. Ticor Title Ins.*, 504 U.S. 621, 632-33 (1992); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991); *Patrick v. Burget*, 486 U.S. 94, 99 (1988); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 (1987); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 55-57 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985); *Hoover*, 466 U.S. at 567-68; *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 48-49 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103-04 (1980); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 389, 408-09 (1978); *Bates v. State Bar*, 433 U.S. 350, 359 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. at 579, 585-91 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975).

merce was seriously restricted. *See Parker,* 317 U.S. at 344-49. The program was challenged under the Sherman Act. The Supreme Court decided that Congress, in enacting federal antitrust legislation, had not intended to preempt economic regulation by the states. The central holding of *Parker* was that the Sherman Act does not "restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. The Court expressly rested its analysis on federalism principles:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 551.

The *Parker* state-action doctrine has been construed to exempt both state agencies and private individuals from liability for activities that might otherwise violate federal antitrust law. *See, e.g., Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 56-57 (1985). When the *Parker* exemption is invoked by a defendant other than the state, however, the allegedly anticompetitive activity is subjected to greater scrutiny before state-action immunity will be granted. *See Hoover v. Ronwin,* 466 U.S. 558, 569 (1984). In most cases, two criteria must generally be satisfied: (1) the alleged anticompetitive conduct must have been taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with state regulation; and, (2) the state must actively supervise the implementation of its policy. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum,* 445 U.S. 97 (1980); *DFW Metro Line Servs. v. Southwestern Bell Tel., Corp.,* 988 F.2d 601, 605 (5th Cir.), *cert. denied,* 510 U.S. 864 (1993); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST

LAW ¶ 212.1a (Supp. 1997). This two-pronged review is commonly known as the *Midcal* test.

Some defendants are not subject to both prongs of *Midcal* review. In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Supreme Court exempted municipalities from the active-supervision prong of the *Midcal* test. *See Town of Hallie*, 471 U.S. at 46-47. The Court distinguished municipalities from other defendants subjected to the *Midcal* test:

> Where a private party is engaging in the anti-competitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Id. at 47. Fortunately for the defendants,[10] the Board is functionally similar to a municipality and is also exempted from the active-supervision prong. Despite the

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[10] Exemption from the "active supervision" requirement is fortunate from the Board's perspective because its rulemaking process was not actively supervised. Despite the legislature's reservation of power to review the Board's proposals for new rules, rule changes can take effect without any active oversight by the legislature. LA. REV. STAT. ANN. § 49:968 (West 1987 & Supp. 1998). That is in fact what happened regarding the rules challenged in this case, and the situation is indistinguishable from the "negative option system" which was determined by the Supreme Court not to constitute active state supervision. *See Ticor*, 504 U.S. at 629, 638-40.

fact that the Board is composed entirely of CPAs who compete in the profession they regulate, the public nature of the Board's actions means that there is little danger of a cozy arrangement to restrict competition. So long as the Board is acting within its authority and pursuant to a clearly established state policy, there is no need for active supervision of the exercise of properly delegated authority. This conclusion comports with our prior precedent and that of other courts of appeals. *See Benton, Benton & Benton v. Louisiana Pub. Facilities Auth.*, 897 F.2d 198, 203 (5th Cir. 1990) (determining the defendant to be a state agency and "as such" not subject to the active state supervision prong of *Midcal*), *cert. denied*, 499 U.S. 975 (1991); *see also Porter Testing Lab. v. Board of Regents for Okla. Agric. & Mechanical Colleges*, 993 F.2d 768, 772 (10th Cir.) (where the antitrust defendants included "a constitutionally created state board, its executive secretary, and a state created and funded university . . . a showing of active supervision is unnecessary to qualify for state action antitrust immunity"), *cert. denied*, 510 U.S. 932 (1993); *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1047 (2d Cir. 1986) (where the defendant was a statutorily created political subdivision of the state, defendant's "interests must be defined as public rather than private, and consequently, the active state supervision requirement is unnecessary"); *see also* AREEDA & HOVENKAMP, *supra*, ¶ 212.7a ("Dispensing with any supervision requirement for municipalities implies, a fortiori, the same for departments and agencies of the state itself."). Moreover, this development was expressly anticipated by the Supreme Court's *Town of Hallie* decision. *See Town of Hallie*, 471 U.S. at 46 n.10 ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.").

The individual Board members take advantage of the Board's privileged status for the purposes of the *Midcal*

test. The individuals' actions in adopting and enforcing the rules involved in this case were performed in their official capacities as members of the Board. They were, in effect, agents of the Board for the purposes of state-action immunity. *See Crosby v. Hospital Auth.*, 93 F.3d 1515, 1529-30 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1246 (1997).

Thus, in order to take advantage of the state-action exemption, the defendants must simply demonstrate that they acted "pursuant to state policy to displace competition with regulation or monopoly public service" that was "clearly articulated and affirmatively expressed." *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 51 (1982). The Supreme Court has further elaborated on this requirement, noting: "We have rejected the contention that this requirement can be met only if the delegating statute explictly permits the displacement of competition. It is enough . . . if suppression of competition is the 'foreseeable result' of what the statute authorizes." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372-73 (1991).[11]

The evidence of the Louisiana policy supporting the rules against the practice of incompatible professions and the acceptance of commissions consists of the following statutory language:

> The board shall:
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> * * * *
>
> (3) Take appropriate administrative action to regulate the practice of public accounting in the state

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[11] To the extent that *United States v. Texas State Bd. of Pub. Accountancy*, 592 F.2d 919 (5th Cir. 1979), *aff'g* 464 F. Supp. 400 (W.D. Tex. 1978), *cert. denied*, 444 U.S. 925 (1979), suggests that the state-action exemption may be denied because the state statute authorizing the challenged conduct was cast in permissive language rather than mandatory language, the opinion has been overruled by numerous subsequent Supreme Court cases disavowing that reasoning. *See, e.g., Southern Motor Carriers*, 471 U.S. at 59-60.

of Louisiana in the interest of and to preserve and protect the public health, safety and welfare;

* * * *

LA. REV. STAT. ANN. 37:75(A) (West 1988).

The board may:

* * * *

(2) Adopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in the state of Louisiana, to provide for the efficient operation of the board, and otherwise to discharge its duties and powers under this Chapter;

* * * *

(5) Authorize any member of the Board to make any affidavit necessary to the issuance of any injunction or other legal process authorized under this Chapter or under the rules and regulations of the board;

(6) Employ inspectors, special agents, and investigators;

* * * *

(8) Employ legal counsel to carry out the provisions of this Chapter, provided that the fees of such counsel and the costs of all proceedings, except criminal prosecutions, are paid by the board from its own funds;

* * * *

(10) Issue subpoenas under its seal to require attendance and testimony and the production of documents and things for the purpose of enforcing the laws relative to the practice of public accounting and securing evidence of violations thereof;

* * * *

> (12) Adopt and enforce rules and regulations providing for the board's regular, periodic review of the form of audit, review, and compilation reports issued by individuals and firms registered with the board for compliance with applicable, generally accepted standards. * * *
>
> * * * *

Id. 37:75(B) (West 1988 & Supp. 1998). These statutes grant the Board broad power to regulate the profession of accounting. We must determine whether the rules challenged by the plaintiffs are a "foreseeable result" of the state's enabling legislation and therefore promote the state's public policy for the purposes of the state-action doctrine.

The plaintiffs contend that "clear articulation" is not present on these facts. They argue that the state-action doctrine is to be applied narrowly, and the Board members' actions simply do not merit the exemption. Particularly, the plaintiffs object that (1) any "policy" evidenced by the above-quoted statutory language is not "clearly articulated" and (2) the rules enacted by the Board are not the "foreseeable result" of the statutes enacted by the state. The plantiffs assert that their view is supported by Supreme Court precedent which holds that merely neutral stautory language is inadequate to meet the standards of clear articulation and affirmative expression. *See, e.g., Community Communications,* 455 U.S. at 55-56 ("[T]he requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive.").

That argument cannot be accepted. With respect to a regulated entity such as the Board, the Supreme Court has dictated a standard that accords appropriate deference to state sovereignty: "As long as the state clearly articulates its intent to adopt a permissive policy, the first prong

of the *Midcal* test is satisfied." *Southern Motor Carriers*, 471 U.S. at 60. Thus, we cannot deny the state-action exemption based merely upon the failure of the Louisiana legislature to expressly state an intention to displace competition in the accounting profession by restricting the practice of "incompatible professions" and the acceptance of commissions. As the Supreme Court has noted in a analogous context, such an approach would take an "unrealistic view of how legislatures work and of how statutes are written." *Town of Hallie*, 471 U.S. at 43; *see also* AREEDA & HOVENKAMP, *supra*, ¶ 212.3a ("Unfortunately, state statutes seldom speak with clarity on [the elements of the 'clear articulation' requirement], for the federal antitrust consequences of state legislation—especially of state delegations to subordinate units—was hardly significant in the legislators' minds.").

Objectively, the Louisiana legislature "intended" that the Board, through its members, exercise any power which the legislature authorized. Here, the Board was authorized to "[a]dopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in the state of Louisiana." LA. REV. STAT. ANN. § 37:75(B)(2) (West 1988). This is a broad grant of authority which includes the power to adopt rules that may have anticompetitive effects.[12] It is thus the "foreseeable result" of enacting such a statute

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[12] For example, the Board uses its state-granted monopoly power over the practice of public accounting to determine who may compete in the profession. *See id.* § 75(A) (West 1988) (the Board shall administer the licensing of CPAs); *id.* § 77(B) (West Supp. 1998) (CPA license required to practice public accounting in Louisiana); LA. ADMIN. CODE tit. 46, §§ XIX.1101-.2701 (Sept. 1997) <www.stat.la.us/osr/lac/lac.htm> (regulations pertaining to examination, certification, and licensing). This has the effect of artificially limiting supply and therefore raising prices.

that the Board may actually promulgate a rule that has anticompetitive effects.

Whether or not the rules challenged by the plaintiffs would violate the Sherman Act in the absence of a state-action exemption, it is plain that Louisiana has established a permissive policy with respect to the Board's regulation of CPAs. In doing so the state rejected pure competition among public accountants in favor of establishing a regulatory regime that inevitably has anticompetitive effects.

Our analysis is faithful to the principles of federalism that gird the state-action doctrine. As the Supreme Court has noted:

> If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.

Southern Motor Carriers, 471 U.S. at 64. We thus conclude that the "clear articulation" requirement is satisfied by the Louisiana statutes which bless the Board with broad rulemaking authority over the profession of public accounting within the state. The members of the Board are therefore entitled to state-action immunity from federal antitrust laws.

V. Conclusion

For the aforementioned reasons, the judgment of the district court denying defendants' motion to dismiss based on the Eleventh Amendment is reversed to the extent that it denies immunity to the Board itself and to individual Board members on claims grounded in state law. In all

other respects, the ruling is affirmed. The denial of the motion to dismiss based on the state-action doctrine is also reversed. We remand the case for further proceedings. On remand, the district court shall dismiss all claims against the State Board of Certified Public Accountants of Louisiana and all state-law claims against its Board members.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

APPENDIX B

January 8, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 91-3212
Section "S"

KENNETH DON EARLES, *et al.*

versus

STATE BOARD OF CERTIFIED
PUBLIC ACCOUNTANTS, *et al.*

JUDGE MARY ANN VIAL LEMMON
PRESIDING

1. Motion of Defendants, The State Board of Certified Public Accountants of Louisiana, To Dismiss. (Doc. #34)

2. Motion of Defendants' to Dismiss for Failure to State a Claim. (Doc. #22)

The above motions were brought on for hearing on the Court's docket this date, and the Court ruled as follows:

1. Oral Argument, Motion Denied.

2. Oral Argument, Motion Denied.

Date of Entry Jan. 9, 1997

APPENDIX C

[Filed Jun. 3, 1998]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-30159

KENNETH DON EARLES; ALBERT R LEGER; JOSEPH MICHAEL SLEDGE,
Plaintiffs-Appellees

v.

STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANTS OF LOUISIANA; MILDRED M. MCGAHA, CPA; L. PAUL HOOD, CPA; LEON K. POCHE, CPA; LAWRENCE W. STOULIG, JR., CPA; DONALD L. MOORE, CPA; W. THERON ROBERTS, CPA; MICHAEL A. THAM, CPA; SUSAN C. COCHRAN, CPA; J. GORDON REISCHE;
Defendants-Appellants

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before GARWOOD, DUHÉ and DEMOSS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on

the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss, Jr.
HAROLD R. DEMOSS, JR.
United States Circuit Judge

APPENDIX D

STATUTORY PROVISIONS INVOLVED

FROM TITLE 15. COMMERCE AND TRADE

CHAPTER 1. RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

LOUISIANA

ACCOUNTANCY LAW

References are to Louisiana Revised Statutes, as amended

The State Board of Certified Public Accountants of Louisiana, under the Department of Commerce, will terminate its operations, subject to review, on July 1, 1993, sec. ¶ 20,051.

TITLE 37—PROFESSIONS AND OCCUPATIONS

Ch. 2—Accountants

* * * *

Sec. 73. State Board of Certified Public Accountants of Louisiana—Appointment—Domicile. A. The State Board of Certified Public Accountants of Louisiana is hereby created as a state agency within the Department of Economic Development and shall consist of seven persons appointed by the governor each of whom shall be a certified public accountant as defined in this Chapter and a resident of the state of Louisiana.

B. The domicile of the board shall be the city of New Orleans.

C. Each member of the board shall serve as the pleasure of the governor.

D. A vacancy occurring on the board for any reason shall be filled in the same manner as the original appointment was made.

E. Each appointment by the governor shall be made from a list of three or more names submitted to the governor by the Society of Louisiana Certified Public Accountants or its successor.

F. Three members of the board shall be residents of the area comprising the parishes of Ascension, Assump-

tion, East Baton Rouge, East Feliciana, Iberville, Jefferson, Lafourche, Livingston, Orleans, Plaquemines, Pointe Coupee, St. Charles, St. Bernard, St. James, St. John the Baptist, St. Helena, St. Mary, St. Tammany, Tangipahoa, Terrebonne, Washington, West Baton Rouge, and West Feliciana; two members of the board shall be residents of the area comprising the parishes of Acadia, Allen, Avoyelles, Beauregard, Bienville, Bossier, Caddo, Calcasieu, Caldwell, Cameron, Catahoula, Claiborne, Concordia, DeSoto, East Carroll, Evangeline, Franklin, Grant, Iberia, Jackson, Jefferson Davis, Lafayette, LaSalle, Lincoln, Madison, Morehouse, Natchitoches, Ouachita, Rapides, Red River, Richland, Sabine, St. Landry, St. Martin, Tensas, Union, Vernon, Vermilion, Webster, West Carroll, and Winn; and two members shall be appointed from the state at large.

G. Each appointment by the governor shall be submitted to the Senate for confirmation.

[*Last amended by Laws* 1992, *Act* 460, *eff.* 1-14-93.]

Sec. 74. Oath of board members. Each member of the board shall, within thirty days of such member's appointment, subscribe to an oath, before any person authorized to administer oaths in the state of Louisiana, to faithfully and impartially perform the duties of the office. Such oaths shall be filed with the secretary of state.

Sec. 75. Duties and powers of the board.

A. The board shall:

(1) Examine all applicants to be certified or licensed for the practice of public accounting in the state of Louisiana;

(2) Administer a written examination for certification at least once each year in the city of New Orleans;

(3) Take appropriate administrative action to regulate the practice of public accounting in the

state of Louisiana in the interest of and to preserve and protect the public health, safety and welfare;

(4) Have its seal; and

(5) Report to the Attorney General of the state of Louisiana all persons violating the provisions of this Chapter.

B. The board may:

(1) Select its officers, other than the chairman of the board, who shall be designated by the governor from among the membership of the board;

(2) Adopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in the state of Louisiana, to provide for the efficient operation of the board, and otherwise to discharge its duties and powers under this Chapter;

(3) Prescribe and adopt regulations, standards, procedures and policies governing the manner and conditions under which credit shall be given by the board for participation in a program of continuing professional education such as the board may consider necessary and appropriate to maintain the highest standards of proficiency in the profession of public accounting in the state of Louisiana; provided, however, that such regulations, standards, procedures and policies shall not be in excess of or more onerous than those promulgated by the American Institute of Certified Public Accountants;

(4) Administer examinations at such times and in such localities within the state of Louisiana as the Board may consider necessary and appropriate;

(5) Authorize any member of the Board to make any affidavit necessary to the issuance of any injunction or other legal process authorized under this Chapter or under the rules and regulations of the board;

(6) Employ inspectors, special agents, and investigators;

(7) Employ clerical assistance necessary to carry out the administrative work of the board;

(8) Employ legal counsel to carry out the provisions of this Chapter, provided that the fees of such counsel and the costs of all proceedings, except criminal prosecutions, are paid by the board from its own funds;

(9) Incur all necessary and proper expenses;

(10) Issue subpoenas under its seal to require attendance and testimony and the production of documents and things for the purpose of enforcing the laws relative to the practice of public accounting and securing evidence of violations thereof;

(11) Adopt rules and regulations providing for the annual registration of each certified public accountant licensed by the board and each firm of certified public accountants having one or more partners or shareholders licensed by the board; and

(12) Adopt and enforce rules and regulations providing for the board's regular, periodic review of the form of audit, review, and compilation reports issued by individuals and firms registered with the board for compliance with applicable, generally accepted standards. The board shall, during any such period, exempt from the requirement of such review of reports certified public accountants and firms of certified public accountants who, during such period,

have been subjected to a professional peer review approved by and acceptable to the board and conducted pursuant to standards not less stringent than peer review standards applied by the American Institute of Certified Public Accountants. However, in the case of a peer review qualifying for exemption a certified public accountant or accounting firm which is a member of the Securities and Exchange Commission Practice Section or the Private Companies Practice Section of the American Institute of Certified Public Accountants, the peer review report shall have been submitted to the board, or, in the case of a peer review qualifying a certified public accountant or a firm of certified public accountants for such exemption, a certified public accountant or firm of certified public accountants which is not a member of either the Securities and Exchange Commission Practice Section or the Private Companies Practice Section of the American Institute of Certified Public Accountants, the board shall have received certification from the American Institute of Certified Public Accountants or its designee of the accountant's or firm's participation in a peer review program and the dates of the accountant's or firm's most recent peer review. The board may engage a certified public accountant in the unclassified service or firm of certified public accountants to conduct such review on behalf of and as agent for the board and report his or its finding to the board. Rules and regulations adopted by the board hereunder may:

(a) Establish a program for the scheduled inspection, examination, and review of working papers developed by individual and firm registrants in connection with the issuance of any audit, review, or compilation report and provide for such a review of all individual and firm registrants within each three-year period or such longer period as the board may

prescribe. However, the board shall, during any such period, exempt from the requirement of such review of working papers certified public accountants and firms of certified public accountants who, during such period, have been subjected to a professional peer review approved by and acceptable to the board and conducted pursuant to standards not less stringent than peer review standards applied by the American Institute of Certified Public Accountants. However, in the case of a peer review qualifying for exemption a certified public accountant or accounting firm which is a member of the Securities and Exchange Commission Practice Section or the Private Companies Practice Section of the American Institute of Certified Public Accountants, the peer review report shall have been submitted to the board, or, in the case of a peer review qualifying for such exemption, a certified public accountant or firm of certified public accountants which is not a member of either the Securities and Exchange Commission Practice Section or the Private Companies Practice Section of the American Institute of Certified Public Accountants, the board shall have received certification from the American Institute of Certified Public Accountants or its designee of the accountant's or firm's participation in a peer review program and the dates of the accountant's or firm's recent peer review; and

(b) Provide that a certified public accountant or a firm of certified public accountants shall reimburse the board for expenses incurred by the board in connection with its review of the working papers of any such certified public accountant or firm; however, such reimbursable expenses shall include only reasonable travel expenses and a per diem prescribed by the board, and provided further that the aggregate amount of such reimbursable expenses shall not exceed the sum of one thousand dollars as to any

certified public accountant or firm of certified public accountants within any three-year period.

(13)(a) Adopt rules and regulations providing for the issuance, to persons and firms not otherwise certified, licensed, or registered by or with the board but certified and licensed by another state, of temporary permits authorizing the practice of public accountancy in the state of Louisiana limited to a single engagement for a specified period. Such rules and regulations shall prescribe the qualifications, procedures, and fees requisite to application for and issuance of temporary permits, the period for which such permits shall be effective, and the scope of practice authorized by such permits.

(b) Adopt rules and regulations providing for the issuance to persons and firms not otherwise certified, licensed, or registered by or with the board, but certified and licensed by another state, of temporary permits, valid for one year from date of issuance and renewable, authorizing the practice of public accountancy in the state of Louisiana limited solely to the performance of quality reviews or peer reviews. Such rules and regulations shall prescribe the qualifications, procedures, and fees requisite to application for, issuance of, and renewal of such permits.

C. The president and secretary of the board, or in their absence any other member of the board, may administer oaths in the taking of testimony upon any matter appertaining to the duties and powers of the board.

D. Except as required by R. S. 37:84(C), three members of the board constitute a quorum for all purposes, including the administration of examinations, the granting or issuance of certificates and licenses, and the rulemaking and adjudication functions of the board.

Sec. 76. Compensation and expenses of board members. The members of the board shall receive monthly compensation, in an amount to be fixed by the board, for

the time expended by such members in conducting examinations, attending board meetings and hearings, issuing certificates and licenses and discharging other duties and powers of the board. The compensation of the president, secretary and treasurer shall not exceed the sum of one hundred fifty dollars a month per officer, and the compensation of the other members shall not exceed the sum of one hundred dollars a month per member. These expenses shall be paid out of the treasury of the board. No expenses incurred by the board shall ever be charged to or against the funds of the state of Louisiana.

* * * *

CODE OF ETHICS

References are to Louisiana Administrative Code, 1986, as amended

Ch. 5—Rules of Professional Conduct

* * * *

Sec. 501—Independence, Integrity and Objectivity

* * * *

C. Commissions. A licensee shall not pay a commission to obtain a client or accept a commission for a referral to a client of products or services of others. This rule does not prohibit payments for the purchase of all, or a part, of an accounting practice, or retirement payments to persons formerly engaged in the practice of public accountancy, or payments to the heirs or estates of such persons.

* * * *

E. Incompatible occupations. A licensee shall not concurrently engage in the practice of public accountancy and in any other business or occupation which impairs his independence or objectivity in rendering professional services, or which is conducted so as to augment or benefit the accounting practice unless these rules are observed in the conduct thereof.

* * * *

APPENDIX E

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. C.3297

COMMISSIONERS:

Janet D. Steiger, Chairman
Terry Calvani
Mary L. Azcuenaga
Andrew J. Strenio, Jr.
Deborah K. Owen

In the Matter of

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS,
a corporation.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respond-

ent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to § 2.34 of its Rules, and having duly considered the recommendations of its staff to modify the consent agreement pursuant to the comments received and the supplemental letter agreement executed by the respondent's counsel, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order, as modified:

1. Respondent American Institute of Certified Public Accountants is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at 1211 Avenue of the Americas, New York, New York 10036-8775.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that for purposes of this order the following definitions shall apply:

A. "AICPA" means American Institute of Certified Public Accountants and its Board of Directors, Council, committees, task forces, officers, representatives, agents, employees, successors, and assigns;

B. "Attest service" means providing (1) any audit, (2) any review of a financial statement, (3) any compilation of a financial statement when the certified public accountant ("CPA") expects, or reasonably might expect, that a third party will use the compilation and the CPA does not disclose a lack of independence, and (4) any examination of prospective financial information;

C. "Audit" means an examination of financial statements of a person by a CPA, conducted in accordance with generally accepted auditing standards, to determine whether, in the CPA's opinion, the statements conform with generally accepted accounting principles or, if applicable, with another comprehensive basis of accounting;

D. "Commission" means compensation, except a referral fee, for recommending or referring any product or service to be supplied by another person;

E. "Compilation of a financial statement" means presenting in the form of a financial statement information that is the representation of any other person without the CPA's undertaking to express any assurance on the statement;

F. "Contingent fee" means a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service;

G. "Disciplinary action" means revocation or suspension of or refusal to grant membership, or the imposition of a reprimand, probation, constructive comment, or any other penalty or condition;

H. "Examination of prospective financial information" means an evaluation by a CPA of (1) a forecast or projection, (2) the support underlying the assumptions in the forecast or projection, (3) whether the presentation of the forecast or projection is in conformity with AICPA presentation guidelines, and (4) whether the assumptions in the forecast or projection provide a reasonable basis for the forecast or projection;

I. "Forecast" means prospective financial statements that present, to the best of the responsible party's knowledge and belief, an entity's expected financial position, results of operations, and changes in financial position or cash flows that are based on the responsible party's assumptions reflecting conditions it expects to exist and the course of action it expects to take;

J. "Person" means any natural person, corporation, partnership, unincorporated association, or other entity;

K. "Projection" means prospective financial statements that present, to the best of the responsible party's knowledge and belief, given one or more hypothetical assumptions, an entity's expected financial position, results of operations, and changes in financial position or cash flows that are based on the responsible party's assumptions reflecting conditions it expects would exist and the course of action it expects would be taken given such hypothetical assumptions;

L. "Referral fee" means compensation for recommending or referring any service of a CPA to any person;

M. "Review" means to perform an inquiry and analytical procedures that permit a CPA to determine whether there is a reasonable basis for expressing limited assurance that there are no material modifications that should be made to financial statements in order for them to be in conformity with generally accepted accounting principles or, if applicable, with another comprehensive basis of accounting; and

N. "Trade name" means a name used to designate a business enterprise.

II.

IT IS FURTHER ORDERED that AICPA, directly, indirectly, or through any person or other device, in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Restricting, regulating, impeding, declaring unethical, advising members against, or interfering with any of the following practices by any CPA:

1. The offering or rendering of professional services for, or the receipt of, a contingent fee by a CPA, provided that AICPA may prohibit the engaging to render or rendering by a CPA for a contingent fee: (a) of professional services for, or the receipt of such a fee from, any person for whom the CPA also performs attest services, during the period of the attest services engagement and the period covered by any historical financial statements involved in such attest services; and (b) for the preparation of original or amended tax returns or claims for tax refunds;

2. The offering or rendering of professional services for, or the receipt of, a disclosed commission by a CPA, provided that the engaging to render or rendering of professional services by a CPA for a commisison for, or the receipt of a commission from, any person for whom the CPA also performs attest services may be prohibited by the AICPA during the period of the attest services engagement and the period covered by any historical financial statements involved in such attest services;

3. The payment or acceptance of any disclosed referral fee;

4. The solicitation of any potential client by any means, including direct solicitation;

5. Advertising, including, but not limited to:

   (a) any self-laudatory or comparative claim;

   (b) any testimonial or endorsement; and

   (c) any advertisement not considered by AICPA to be professionally dignified or in good taste; and

6. The use of any trade name;

PROVIDED THAT nothing contained in this order shall prohibit AICPA from formulating, adopting, disseminating, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to solicitation, advertising or trade names, including unsubstantiated representations, that AICPA reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act;

B. Taking or threatening to take formal or informal disciplinary action, or conducting any investigation or inquiry, applying standards in violation of this order;

C. Adopting or maintaining any rule, regulation, interpretation, ethical ruling, concept policy, or course of conduct that is in violation of this order;

D. Inducing, urging, encouraging, or assisting any association of accountants to engage in any act that would violate this order if done by AICPA provided, however, that nothing in this order shall prohibit AICPA from soliciting action by any federal, state or local governmental entity; and

E. Applying or interpreting any other language contained in the Code of Professional Conduct or its successors in a manner that would violate this order;

PROVIDED THAT this order shall not prohibit AICPA from:

(a) suspending membership in AICPA if:

i. a member's certificate as a CPA or license or permit to practice as such or to practice public accounting is suspended as a disciplinary measure by any governmental entity;

ii. a member's registration as an investment adviser is suspended by the SEC;

iii. a member's registration as a broker-dealer is suspended by the SEC or by any state agency acting pursuant to any applicable state law or regulation relating to the issuance, registration, purchase or sale of securities; or

iv. a member is suspended from practicing befor the IRS,

but any such suspension by AICPA shall terminate upon reinstatement of any such certificate, license, permit, registration, or authorization to practice; or

(b) terminating membership in AICPA if:

i. a member's certificate as a CPA or license or permit to practice as such or to practice public accounting is revoked, withdrawn or cancelled as a disciplinary measure by any governmental entity;

ii. a member's registration as an investment adviser is revoked by the SEC;

iii. a member's registration as a broker-dealer is revoked by the SEC or by any state agency acting pursuant to any applicable state law or regulation relating to the issuance, registration, purchase or sale of securities;

iv. a member is subject to a final judgment of conviction for criminal fraud or for a crime

punishable by imprisonment for more than one year; or

v. a member is disbarred from practicing before the IRS.

III.

IT IS FURTHER ORDERED that AICPA shall:

A. Distribute a copy of this order and an announcement in the form shown in Appendix A, within thirty (30) days after this order becomes final, to all personnel, agents, or representatives of AICPA having responsibilities with respect to the subject matter of this order and secure from each such person a signed statement acknowledging receipt of this order and said announcement;

B. Distribute by mail a copy of this order and an announcement in the form shown in Appendix A, within thirty (30) days after this order becomes final, to each of its members and to each state society of certified public accountants;

C. Publish this order and an announcement in the form shown in Appendix A, within sixty (60) days after this order becomes final, in an issue of the "Journal of Accountancy," AICPA's monthly journal, or in any successor publication, in the same type size normally used for articles which are published in the "Journal of Accountancy" or in any successor publication;

D. Within ninety (90) days after this order becomes final, publish and distribute to all members of AICPA and to all personnel, agents, or representatives of AICPA having responsibilities with respect to the subject matter of this order revised versions of AICPA's Code of Professional Conduct, Bylaws, concepts of professional ethics, interpretations, ethical rulings, or other policy statements or guidelines of AICPA which (1) delete any material that is inconsistent with Part II of this order and (2) otherwise comply with this order;

E. File with the Federal Trade Commission within sixty (60) days after this order becomes final, one (1) year after this order becomes final, and at such other times as the Federal Trade Commission may by written notice to AICPA request, a report in writing setting forth in detail the manner and form in which it has complied and is complying with this order;

F. For a period of five (5) years after this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Parts II and III of this order, including any written communications and any summaries of oral communications, and any disciplinary action; and

G. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed changes in AICPA, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

By the Commission. Commissioners Azcuenaga and Owen dissented.

/s/ Donald S. Clark
DONALD S. CLARK
Secretary

SEAL

ISSUED: July 26, 1990

(2)

Supreme Court, U.S.
FILED
OCT 9 1998
CLERK

No. 98-385

In The

Supreme Court of the United States

October Term, 1998

KENNETH DON EARLES, C.P.A., *et al.*,

Petitioners,

vs.

STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANTS OF LOUISIANA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Through the petition for writ of certiorari, this Court is pressed to review a decision of the Court of Appeals for the Fifth Circuit granting state action immunity[1] to the State Board of Certified Public Accountants of Louisiana and several of its present and former members and officers (collectively the "Board").[2] Petitioners are licensed Louisiana CPAs[3] who challenge the Board's duty and right to enforce its Rules and to seek compliance by petitioners with those Rules. Specifically, petitioners were charged with having violated the Board's Rules on Incompatible Occupations and Commissions[4] by selling securities and offering investment advisory services to its tax and accounting clients. The Board has determined that

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1. In its decision, the Fifth Circuit also granted the Board immunity pursuant to the Eleventh Amendment to the United States Constitution. It appears that petitioners do not seek review of this grant of immunity through their Petition.

2. Mildred M. McGaha, L. Paul Hood, Leon K. Poché, Lawrence W. Stoulig, Jr., Donald L. Moore, W. Theron Roberts, Michael A. Tham, Susan C. Cochran and J. Gordon Reische.

3. Plaintiffs-petitioners are CPAs licensed in Louisiana and, as such, are subject to the rules and regulations of the Board. Unless a person maintains

> "a current certified public accountant certificate" issued by the Board, he or she may not "assume or use the title or description 'certified public accountant'. . . or 'C.P.A.' " or "engage in the practice of public accounting in the State of Louisiana. . . ."

La. Rev. Stat. Ann. § 37:77(A) and (B) (West 1988).

4. *See* Pet. App. at 36a for text of Rules at issue.

petitioners' dual capacity activities create an intolerable conflict between the self-interest of a CPA-broker and the best interest of his client. This conflict irreparably impairs the objectivity of the CPA, an essential requisite to the CPA's practice. Petitioners have responded by filing suit and alleging that the Board is engaged in "price fixing" and has violated their constitutional rights through the enforcement of its Rules. This case is neither about price fixing nor about over-zealous regulation.

The Board, as a legislatively mandated state agency[5], seeks only to fulfill its *duty, responsibility* and *right* to regulate Louisiana CPAs to preserve and protect the public health, safety and welfare. How is the public welfare implicated? Petitioners' application explains the issue fairly well, if unintentionally. For petitioners assert that by combining certain accounting services with their financial investment advice, they offer the public "one stop shopping." While they argue that this bundling of services benefits the consumer by achieving efficiencies in the area of professional financial planning, including tax and investment advice, they admit that the point of their dual dealing is to trade on their accounting clients' trust and on their own intimate knowledge as accountants of their clients' financial

5. The Board was created as an agency of the State of Louisiana for the purpose of licensing public accountants and regulating the profession of public accounting in Louisiana. La. Rev. Stat. Ann. §§ 37:73, 37:75 (West 1988 & Supp. 1998). The Board's members are chosen by the governor and confirmed by the Louisiana Senate. La. Rev. Stat. Ann. § 37:73 (West 1988). Among the powers of the Board is the ability to "[a]dopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in the state of Louisiana." La. Rev. Stat. Ann. § 37:75 B(2) (West 1988). In accordance with its statutory mandate, the Board promulgated rules prohibiting licensed CPAs from engaging in incompatible occupations and from receiving certain commissions for sales or referrals.

situations and risk preferences. They admit that objectivity may reasonably be required of them in their dealings with their clients — as in counseling with them on tax matters or in preparing tax returns — but adamantly refuse to admit that the reasonably required objectivity may be impaired by the prospect of commissions to be earned on securities to be sold — "This limited partnership interest is such a nice fit for someone in your tax status" — or by the need to put the best face on an investment gone bad — "The service won't look twice if we just expense the whole amount." The outcome of this case does not, of course, depend on petitioners' acquiescence in the correctness of the Rules or even on their inherent correctness as a matter of policy. It turns instead on the foreseeability of the Board's using its authority over the profession to promulgate and enforce rules to preserve the objectivity of professional licensees, to protect the public, and to maintain public trust in the profession. That is all that is necessary for state-action immunity.

Each petitioner represents that he "holds himself as a CPA for *the purposes of identifying and promoting his accounting practice*" (emphasis added). Thus, petitioners do not contest that there is a benefit to being a CPA. The fact that the CPA license adds greatly to furthering the trust relationship with his clients cannot be hidden. The importance of petitioners maintaining their CPA licenses is clear. Were the petitioners to lose the license, the reasons would raise questions that might affect the "trust." However, to maintain that license and enjoy the privileges appertaining thereto, one must comply with the rules and regulations governing the profession. Petitioners have a choice. Each could offer non-public accounting services and sell securities for which they could receive commissions. In this scenario, petitioners would not practice as licensed CPAs. Conversely, each petitioner could subject himself to the Board's jurisdiction, hold himself out as a licensed CPA, and earn a

living as a licensed CPA. In this second scenario, each must forego the brokerage of securities. The sovereign, for very good reasons, has determined that they cannot do both.

Absent from petitioners' presentation is the description of the "benefits" derived by H.D. Vest Financial Services, petitioners' employer. That is, to reap profits, H.D. Vest desires to make an immediate and substantial impact in the arena of consumer financial investment services. What better way to achieve this result, than to trade on the credibility of a well-established CPA?

Petitioners and H.D. Vest wish to trade on this trust for their own self-interest.[6] By enlisting CPAs as brokers, H.D. Vest has a "captive consumer market" where the essential trust relationship is established and significant information regarding the individual consumer's financial position is known. By recruiting CPAs as brokers, H.D. Vest enjoys immediate access and credibility. Despite petitioners' sugar-coated representations about the detriment to the consumer, for H.D. Vest, petitioners' employer and benefactor, this case is about money.

The Proceedings Below. Plaintiff Earles, joined subsequently by Leger and Sledge, brought suit against the Board, seeking to block enforcement of the Rules, in the United States District Court for the Eastern District of Louisiana. The Board filed a motion to dismiss the suit, asserting its immunity from suit under the Eleventh Amendment and the state action doctrine first recognized by this Court in *Parker v. Brown*, 317 U.S. 341 (1943). The district court denied the motion, issuing

6. Of H.D. Vest's 5,000 brokers, approximately 40 to 50 percent are CPAs. *See* "Bending to industry forces, States ease commission bans on Certified Public Accountants' Commissions — Wall Street Comes A-Courtin'," *Accountancy Today*, Vol. 10, No. 12 (July 8, 1996).

no written reasons in support, and the Board sought immediate review in the United States Court of Appeals for the Fifth Circuit.

The court of appeals determined it had appellate jurisdiction, by virtue of 28 U.S.C. § 1291 and the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), to consider the appeal from the denial of the motion to dismiss based upon both Eleventh Amendment and state action immunity doctrines. *Earles v. State Board of Certified Public Accountants of Louisiana*, Pet. App. 1a-23a, reported at 139 F.3d 1033 (5th Cir. 1998). The court determined that the Board is entitled to immunity from suit under the Eleventh Amendment. Pet. App. at 11a.

In addition, the court concluded that state action immunity is properly treated as an immunity from suit. Pet. App. at 14a. Further, the court held that the Board had been given a broad grant of authority by the Louisiana Legislature, authority that includes the power to adopt rules that may have anticompetitive effects. The Board, according to the court, demonstrated that it acted pursuant to state policy to displace competition with regulation that was clearly articulated and affirmatively expressed, in conformity with the requirements set forth by this Court in *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 51 (1982). The court concluded that it is the foreseeable result of enacting a statute such as those creating and empowering the Board that the Board may actually promulgate a rule that has anticompetitive effects. Pet. App. at 21a-22a; *see also City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372-73 (1991).

Consequently, the court of appeals reversed the district court's judgment denying the Board's motion to dismiss based on the state action immunity doctrine. It is from that judgment

of the court of appeals that the petitioners have sought this Court's review.

REASONS FOR DENYING THE WRIT

The Board respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Fifth Circuit's judgment and opinion. Review by means of a writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. That discretion should be exercised to grant such a petition only for compelling reasons. *Id.* No compelling reason exists in this case.

I.

THE FIFTH CIRCUIT PROPERLY EXERCISED JURISDICTION UNDER THE *COHEN* COLLATERAL ORDER DOCTRINE TO RESOLVE THE QUESTION WHETHER RESPONDENT WAS ENTITLED TO STATE ACTION IMMUNITY FROM AN ANTITRUST SUIT.

A. No intolerable inter-circuit conflict exists.

Petitioners expend much ink in an attempt to depict the Fifth Circuit's exercise of its appellate jurisdiction in this case as "exacerbating a split among the Circuits" on whether a state or an arm of the state that invokes its immunity from suit under *Parker* is entitled to an immediate appeal from the trial court's adverse ruling on the immunity issue. To the extent that a split among the Circuits exists, it is not of the magnitude that warrants the squandering of this Court's scarce judicial resources to harmonize.

The court of appeals in this case exercised its appellate jurisdiction under *Cohen* to review the district court's denial

of the defendant's motion to dismiss under the state action immunity first recognized by this Court in *Parker*. In doing so, it relied on its prior opinion in *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996) in which it had held that the district court's refusal to grant the defendants' motions for summary judgment vindicating their entitlement to state action immunity was immediately appealable under the collateral order doctrine. *Id.* at 1394.

In *Martin*, the Fifth Circuit recognized that such a ruling meets all of the requisites of an appealable collateral order, *viz.*, that it is effectively unreviewable on appeal after trial, that it conclusively determines the disputed question, and that it resolves an important issue completely separate from the merits of the action. *Id.* (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) and *Cohen*). It concluded that the *Parker* state action immunity shares the essential element of absolute, qualified, and Eleventh Amendment immunities, to wit, an entitlement not to stand trial under certain circumstances. *Martin*, 86 F.3d at 1395.

This Court has made clear that orders denying absolute, qualified, and Eleventh Amendment immunities are among those that fall within the ambit of *Cohen*. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). The Fifth Circuit in *Martin*, and again in the present case, correctly decided that the *Parker* state action immunity shares all of the attributes viewed as significant by this Court in *Nixon*, *Mitchell*, and *Puerto Rico Aqueduct*. The Fifth Circuit's view is correct. Because, like Eleventh Amendment immunity, the *Parker* state action antitrust immunity is an immunity *from suit*, it is lost forever if it is erroneously denied a defendant. As is Eleventh Amendment immunity, therefore, it is properly appealable as a

final decision within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment. *See Martin*, 86 F.3d at 1397.

In reaching this conclusion, the Fifth Circuit is in full accord with similar holdings of the Eleventh Circuit. That court, in *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986), recognized that the purpose of the state action doctrine is to avoid needless waste of public time and money. It found the reasoning of this Court in *Mitchell* to be dispositive and held that the denial of a summary judgment based on the state action immunity asserted by the defendant constitutes an appealable collateral order under *Cohen*. *Hillsborough*, 801 F.2d at 1290.

The Eleventh Circuit reached a similar result in *Askew v. DCH Regional Health Care Authority*, 995 F.2d 1033 (11th Cir.), *cert. denied*, 510 U.S. 1012 (1993). Relying on both *Mitchell* and *Hillsborough*, the court held that the *Parker* doctrine provides an immunity from suit rather than a mere defense to liability. *Id.* at 1036. Also, questions relating to immunity are "conceptually distinct from the merits" of a plaintiff's claim. *Id.* Thus, the district court's denial of a motion to dismiss or for summary judgment was held a final and appealable order under *Cohen*.

More recently, in *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), *cert. denied*, 517 U.S. 1190 (1996), the Eleventh Circuit held simply that "[t]here is collateral order appellate jurisdiction of the appeals of" certain state entities, *Id.* at 611, and that, "[d]enial of state action immunity from antitrust liability by summary judgment is immediately appealable." *Id.* The Fifth Circuit's holdings in *Martin* and in this case are clearly in harmony with those of the Eleventh Circuit.

Petitioners in this case assert that

> [t]he Fifth Circuit's approach is . . . in considerable tension with several other Circuits' practice of hearing interlocutory appeals from denials of state action immunity only after the district court has certified the state action question under 28 U.S.C. § 1292(b).

Pet. at 11. In support, petitioners cite *Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988); *Catalina Cablevision Associates v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984); *LaSalle Nat'l Bank v. DuPage County*, 777 F.2d 377 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); and *Grendel's Den, Inc. v. Goodwin*, 662 F.2d 88 (1st Cir. 1981), *aff'd sub nom., Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

In none of the cited cases, however, was the issue of appealability under the *Cohen* collateral order doctrine addressed by the court or even presented for review. Petitioners appear to argue that because the parties in those cases sought from and were granted by the district court, the appropriate § 1292(b) certification, and because the courts of appeals agreed that the issues presented were significant enough to hear immediately, that there is somehow an implicit acknowledgment that collateral order appeals were not appropriate. Clearly, that argument does not comport with basic principles of logic. The issue of *Cohen* appealability was simply not presented for review. Consequently, these cases present no intolerable or, for that matter, actual, conflict with the Fifth Circuit's holding in either *Martin* or in this case. While this Court appropriately acts to resolve real conflicts between Circuits, it does not sit to alleviate perceived "tensions," whether considerable or not, between the *legal holdings* of one Circuit and the *unexpressed practices* of another.

Unlike the petitioners' allegation of "considerable tension" between the Fifth Circuit's case law and perceived practices of the First, Seventh, and Ninth Circuits, their assertion regarding *Huron Valley Hospital, Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir.), *cert. denied*, 479 U.S. 885 (1986) is that it squarely conflicts with this case. Pet. at 9. To the extent that the cases are not distinguishable on their facts, any conflict presented is not so intolerable as to require this Court's review.

The aggrieved parties in *Huron* sought, in an immediate appeal, the court of appeals' review of the district court's denial of the defendants' motions for summary judgment based upon both qualified immunity and *Parker* state action immunity. Citing *Mitchell v. Forsyth*, the court determined it had jurisdiction to review the qualified immunity claim as an appealable collateral order. 792 F.2d at 567. At the same time, however, the court concluded that it did not have jurisdiction to entertain an immediate appeal on the merits of the denial of the defendants' assertion of state action immunity. *Id.* at 567-68.

Notably, while the Sixth Circuit believed that *Parker* immunity is not an entitlement of the same magnitude as qualified immunity or absolute immunity, it concluded that the analysis necessary to determine whether the immunity claim was completely separate from the merits of the original claim overlapped the analysis necessary to determine whether the defendants violated the rights of the plaintiff in the case before the court. *Huron*, 792 F.2 at 567. In the court's words, "[t]hese conclusions are intimately intertwined with the ultimate determination that anticompetitive conduct has occurred in violation of the protected rights of" the plaintiff. *Id.*

Thus, unlike in the present case, the Sixth Circuit determined that the requirement that the immunity claim must

be completely separate from the merits of the original claim had not been met, *Id*, a determination that renders *Huron* clearly distinguishable from the case before the Court as well as from *Martin* and the Eleventh Circuit cases cited previously. There is, accordingly no inter-circuit conflict to be resolved.

Even if the Court were to deem *Huron* legally indistinguishable from this case, the apparent conflict among the Circuits is not one this Court need resolve because the *Huron* opinion stands isolated. Neither any other Circuit nor any district court has relied on *Huron* for the proposition that denials of state action immunity are not immediately appealable collateral orders.

Perhaps most telling, even the Sixth Circuit has not relied on it again. Indeed, when that court has cited *Huron* it is for the rather unremarkable propositions that: (1) the denial of a motion for summary judgment is not typically a final judgment subject to immediate appeal; and (2) a court of appeals has no obligation to review other issues on appeal simply because the court has entertained an immediate appeal of the denial of qualified immunity.

Thus, while it would be an overstatement to assert that the case has fallen into a type of judicial desuetude, it is not inaccurate to characterize the case as an isolated, twelve year-old expression of the views of one panel of one Circuit, an expression that has not been reaffirmed nor has it been of even the slightest persuasive authority. This orphan simply does not create the intolerable inter-circuit conflict that has historically propelled the Court to harmonize the law.

B. Reversing the Fifth Circuit's judgment will upset settled expectations and will burden sovereign states entitled to be immune from suit.

Petitioners wish to apply the *Parker* doctrine as immunity from liability rather than immunity from suit. In challenging the jurisdiction of the Fifth Circuit to entertain the denial of state action immunity pursuant to the *Cohen* collateral order doctrine, petitioners attempt to differentiate the Eleventh Amendment immunity from suit from state action immunity. The propriety of the immediate appeal of a denial of state action immunity is best evaluated through responding to a single question — Is it reasonable for the state and its agencies to be subject to a costly lawsuit even if it may be immune from such proceedings? This answer is an obvious no.

The sovereign states, and their agencies acting pursuant to clearly articulated state policies, have, since 1943, ordered their affairs in such a way as to pursue legitimate regulatory powers free from being subjected to accusations of antitrust violations, with the attendant time, expense, and chilling effects of protracted litigation. As both the Fifth and the Eleventh Circuits have consistently recognized, the same factors that support *immunity from suit* where absolute, qualified, or Eleventh Amendment immunities are involved, support immunity from suit where a state or its agency engages in policies pursuant to its police power that may foreseeably have anti-competitive effects. That such acts may be prohibited to private actors by virtue of the Sherman, Clayton, or other antitrust acts is irrelevant to a state's intent to protect its citizens from what it calculates to be greater evils. The primary justification of state action immunity is the same as that of Eleventh Amendment immunity, to wit, "to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties" and to "ensur[e] that the States' dignitary

interests can be fully vindicated." *Puerto Rico Aqueduct*, 506 U.S. at 146.

Because of the settled expectations of the states and their agencies, and because of the potential harm they will suffer as a result of an incorrect denial of immunity, their immunity under the state action doctrine must be resolved at the earliest possible time. Once a state has been subjected to the travails of discovery and trial, the proverbial bell cannot be un-rung. Thus, denials of immunity properly fall within the ambit of *Cohen:* they are effectively unreviewable on appeal after trial; they conclusively determine the disputed question; and they resolve an important issue completely separate from the merits of the action. *See Coopers & Lybrand*, 437 U.S. at 468. The Fifth Circuit's ruling on the jurisdictional issue was clearly correct and serves to promote, rather than retard, these interests.

The Fifth Circuit's decision on the applicability of the state action immunity doctrine was, similarly, correct. The courts of appeals have proceeded from the basic assumption that the Sherman Act never had, as an underlying purpose, the restraint of state action. Rather, the Sherman Act declared that it prevented only the acts of "business combinations." 21 Cong. Rec. 2562, 2457, 2459, 2461. The Act must be taken to be a prohibition of individual and not state action. *See Parker*, 317 U.S. at 352.

The Board recognizes and heartily agrees with the proposition, quoted by petitioners, at Pet. 16, that "[t]he preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992). Protecting the public from the obvious conflicts of interest presented by CPAs who steer their clients to investments sold by the CPA, who will also realize a commission for the sale,

has none of the earmarks of the practices the Sherman Act was calculated to prevent.

Accordingly, in addition to the fact that no intolerable inter-circuit conflict is presented by this case, the Fifth Circuit's opinion is in complete accord with the dictates of this Court. The settled expectations of the states and the agencies they create should not be disturbed.

II.

PETITIONERS' ANTITRUST ANALYSIS IS FLAWED AND A REVERSAL OF THE FIFTH CIRCUIT'S DECISION WOULD SERVE ONLY TO UPSET WELL-SETTLED MATTERS RELATING TO THE APPLICABILITY OF STATE ACTION IMMUNITY TO THE ARMS OF THE STATE.

Through a calculated and misleading sophistry, petitioners attack the Fifth Circuit's decision that the Board enjoys immunity from antitrust suit under the *Parker* doctrine. Petitioners first challenge the Fifth Circuit's opinion that the Board, when enforcing its Rules, acts through a clearly articulated and affirmatively expressed state policy. Surprisingly, petitioners begin by mischaracterizing the Board's enforcement of its Rules as "price-fixing"[7] and by misclassifying the individual Board members as private actors engaged in anticompetitive activity for their own self-interest.[8] Pet. at 16-19. Petitioners then argue erroneously that "[t]he Fifth

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7. Petitioners' characterization is surprising in light of the fact that they failed to allege "price-fixing" in either their original complaint or in their amended complaint.

8. Petitioners failed to allege "price-fixing" in either their original complaint or in their amended complaint, each exceeding 20 pages.

Circuit's decision in this case can be upheld only if *Goldfarb* is no longer good law." Pet. at 19-21. Finally, petitioners conclude their suspect plea by misleadingly asserting that the Fifth Circuit's decision on both the clear articulation and active supervision prongs of the *Midcal*[9] test conflicts with the approach taken by other circuits and is contrary to existing law. Pet. at 22-30.

As demonstrated below, the prior decisions of this Court and those of the courts of appeals make clear that petitioners' allegations and contrived arguments are not pertinent to the analysis and that the alleged "conflict between the circuits" does not exist. In essence, petitioners pray that this Court revisit matters well settled and embrace the already rejected notion that state legislatures must ". . . catalog all anticipated effects of a statute . . ." and ". . . expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43 (1985) (rejecting this argument on grounds that it demonstrated an "unrealistic view of how legislatures work and how statutes are written.") Consequently, petitioners' Petition for Writ of Certiorari should be denied.

A. Petitioners' allegation of price fixing is meritless and is not germane to the state action immunity determination.

Petitioners' characterization of the Board's enforcement activities as "self-interested, anticompetitive" price-fixing is the proverbial red herring. It is of no moment that the Board is composed of CPAs and that its members may, therefore, be "interested" in rules and enforcement proceedings at issue. Louisiana's expression of sovereign will that the Board be so constituted cannot be clearer.[10] Besides, there is no market

9. *California Liquor Dealers Association v. Midcal Aluminium, Inc.*, 445 U.S. 97 (1980).

10. La. Rev. Stat. §37:73 provides in pertinent part: (Cont'd)

participant exception to the doctrine of state action immunity. *See Paragould Cablevision, Inc. v. City of Paragould, Ark.*, 930 F.2d 1310 (8th Cir.), *cert. denied*, 502 U.S. 963 (1991); *accord, Greenwood Utilities Comm'n v. Mississippi Power Co.*, 751 F.2d 1484 (5th Cir. 1985). Moreover, and perhaps most importantly, this Court has noted previously that even though a market actor may be in competition with the individual subject of disciplinary action, such activity is considered to be a fulfillment of the obligations and duties of that particular position and not anticompetitive activity. *See Bates v. State Bar of Arizona*, 443 U.S. 350 (1977).

Petitioners' allegation of price fixing is an exercise in misdirection. This case is not about price fixing. From the outset and throughout their application, petitioners mischaracterize the Board's enforcement of the Incompatible Occupation Rules and the Rule on Commissions as part of a scheme to fix prices. Through an extraordinary leap of logic, petitioners argue that these two Rules "restrict competitive pricing" and, therefore, are "tantamount to price-fixing." But neither the original nor amended complaint (both of which contain in excess of 20 pages of allegations) alleges illegal price-fixing. It bears worth repeating, this case is about the Board, as a legislatively mandated state agency, and *its duty, responsibility and right* to regulate Louisiana's CPAs and to

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(Cont'd)

§ 73. State Board of Certified Public Accountants of Louisiana; appointment; domicile

A. The State Board of Certified Public Accountants of Louisiana is hereby created as a state agency within the Department of Economic Development and shall consist of seven persons appointed by the governor each of whom shall be a certified public accountant as defined in this Chapter and a resident of the state of Louisiana.

preserve and protect the public health, safety and welfare. For petitioners, they carry the banner of their employer, H.D. Vest, which seeks substantial monetary profits derived by the CPA-brokers who trade on the trust created through the accounting relationship. Given H.D. Vest's financial motivation, the allegation of "price-fixing" is exposed for what it is — an inflammatory, misleading characterization pitched to create an allure that may pique the interest of the courts in an otherwise mundane enforcement action.

B. Price fixing cases, like *Goldfarb*, do not apply.

In further advancement of their strained reasoning, petitioners claim that "the Fifth Circuit's decision in this case can be upheld only if *Goldfarb* is no longer good law." Pet. at 21. In this case, there is no question of the State of Louisiana or its agency, the Board, being a participant in a private agreement or combination by others for the restraint of trade. Similarly, there is no suggestion that the Board, in promulgating its rules, has acted to set minimum fees. Thus, the Fifth Circuit did not "ignore" *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), as the petitioners suggest. Pet. at 15. Rather, the court properly recognized that *Goldfarb* is factually distinguishable from the present case.

Additionally, the Board maintains that *Goldfarb* is distinguishable and that *Bates v. State Bar of Arizona*. 433 U.S. 350 (1977) controls. In *Goldfarb*, the enforcement of a professional regulation (a proposed minimal fee schedule for attorney services) impacted directly the price paid by consumers for legal services. This Court held that the attorney minimum fee schedule prescribed by a county bar association violated the Sherman Act because the proposed schedule was neither "required" nor "compelled" by state statute or state common

law and because the preparation of the actual schedule of fees was left to the discretion of the county bar. [11]

Goldfarb obviously does not control. First, the Rule on Incompatible Occupations and the Rule on Commissions are not the equivalent of a minimum fee schedule. The Board's enforcement of these rules does not result in a "fixed, rigid price floor" as was the case in *Goldfarb*. It strains credulity to suggest that price competition has been eliminated in the market for accounting services because of the Board's enforcement of these regulations. Second, the Court took special note that the fee schedule in question was left to the discretion of the county bar association (not a state agency) and was not compelled by either the Supreme Court of Appeals (the actual entity with the legislative mandate) or the Virginia State Bar Association (an authorized state agency). *Goldfarb*, 421 U.S. at 790-92.

This Court's decision two years later in *Bates* makes the distinction explicitly. In *Bates*, the Court applied the standard

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11. This Court reviewed the grant of authority by the Virginia legislature to the Virginia Supreme Court of Appeals. The pertinent provision provided in part that:

> The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of the state, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing.

See Goldfarb, 421 U.S. at 775, n.2 (quoting Virginia Code Ann. § 54-49 (1972)).

set out in *Goldfarb* to Arizona State Bar regulations that restricted the advertising practices of lawyers. The Court held that a restraint upon attorney advertising imposed by the Supreme Court of Arizona, wielding the power of the state over the practice of law, was *not* subject to attack under the Sherman Act. The Court began its analysis by recalling and limiting *Goldfarb*, commenting that

> [i]n holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intended no diminution of the authority of the State to regulate its professions. [*Goldfarb*,] 421 U.S. at 793. Allowing the instant Sherman Act challenge to the disciplinary rule would have precisely that undesired effect.

Bates, 433 U.S. at 359 n.11. Concluding its analysis, the Court wrote:

> [I]t cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent [in *Goldfarb*]. . . . In the instant case [*Bates*], by contrast, the challenged restraint is the affirmative command of the Arizona Supreme Court . . . the ultimate body wielding the State's power over the practice of law, . . . and thus, the restraint is "compelled by direction of the State acting as sovereign."

Bates, 433 U.S. at 360 (citations omitted).

As is the Board here, the Supreme Court of Arizona and the State Bar of Arizona were, in *Bates*, creatures of state

law.[12] The Supreme Court of Arizona, as "ultimate body wielding the State's power over the practice of law," could and did promulgate the rules for the regulation of the legal profession, and such rules were considered compelled by the state as sovereign, despite the absence of any state constitutional or statutory compulsion that attorney advertising, specifically, be controlled.

While the grant of authority to the Board by the Louisiana Legislature does not specifically direct the Board to promulgate a rule of professional conduct that prohibits the brokerage of securities by CPAs, the Board has been charged with the responsibility of regulating and administering the profession. In meeting its responsibility, it promulgated the Incompatible Occupations Rule and the Rule on Commissions and enforced these Rules against petitioners for their non-compliance. *Bates*, not *Goldfarb*, controls, and the Board enjoys state-action immunity.

Bates teaches that "the regulation of the activities of [its professions] is at the core of the State's power to protect the

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12. Rule 27(a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. pp. 84-85 (1973) provides in pertinent part:

> 1. In order to advance the administration of justice according to law, . . . the Supreme Court of Arizona does hereby perpetuate, create and continue under the direction and control of this Court an organization known as the State Bar of Arizona, and all persons now or hereafter licensed in the state to engage in the practice of law shall be members of the State Bar of Arizona in accordance with the rules of this Court. . . .
>
> * * *
>
> 3. No person shall practice law in this State or hold themselves as one who may practice law in this State unless he is an active member of the state bar.

public." *Bates*, 433 U.S. at 361; *see also Goldfarb*, 421 U.S. at 792. It is from a state's "compelling interest" in regulating professions practiced within its boundaries that its state-action immunity derives. If petitioners' arguments were to prevail, Louisiana's sovereignty would be severely compromised and the balance between federal and state sovereignty acknowledged in *Parker* would be upset.

C. Petitioners' perception of tension between the circuits is inaccurate, and the Fifth Circuit has followed correctly the teachings of this Court.

Petitioners perceive that the Fifth Circuit's decision in this matter conflicts with the First Circuit's decision in *FTC v. Monahan*, 832 F.2d 688 (1st Cir. 1987). Pet. at 21-22. Petitioners only obfuscate the issue by dropping Judge Breyer's decision in *Monahan* into the discussion. In *Monahan*, the First Circuit evaluated the propriety of subpoenas issued by the Federal Trade Commission to the Massachusetts Board of Registration in Pharmacy. The Board of Pharmacy objected to the subpoenas and argued that it was immune from compliance on state-action grounds. Citing Judge Breyer's decision in *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. 1987) ("Massport"),[13] the Board of Pharmacy argued that the court of appeals could look only to the antitrust complaint to determine the propriety of its claim for immunity. Distinguishing *Massport*, Judge Breyer wrote that "[b]ecause *Massport* was not a subpoena enforcement case, we could look at the complaint and directly compare the claimed activities with Massport's authorizing legislation." *Monahan*, 832 F.2d

13. In *Massport*, a charter airline operator brought an action against the Massachusetts Port Authority alleging the Authority's refusal to allow it to use a particular terminal airport violated federal antitrust laws and certain federal aviation statutes; the district court dismissed the case pursuant to Fed. R. Civ. P. 12(b)(6). *See Interface Group, Inc. v. Massachusetts Port Authority*, 631 F. Supp. 483, 496-97 (D. Mass. 1986).

at 690. Thus, in Judge Breyer's own words, *Monahan* was different because it was a "subpoena enforcement case." Consequently, petitioners' reliance upon *Monahan* is misplaced.

Petitioners next attempt to challenge the Fifth Circuit's decision to follow this Court's dictated standard that "accord[s] appropriate deference to state sovereignty" and the Fifth Circuit's holding that "[a]s long as the state clearly articulates its intent to adopt a permissive policy, the first prong of the *Midcal* test is satisfied. *Southern Motor Carriers*, 471 U.S. at 60." Pet. App. 20a-21a. The reasoning of the Fifth Circuit is clear. And, petitioners' dissatisfaction with the holding is more a product of having encountered an adverse decision rather than mounting a serious attack upon the Fifth Circuit's application of existing law. Essentially, petitioners are blind to the decisions of the Fifth and its sister circuits that have followed this Court's holdings in *Town of Hallie* and *Omni* by evaluating state agencies in the same manner as municipalities. *See Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996) (*held* defendant agency composed of both a municipality and a state subdivision hospital district entitled to state action immunity although the legislative grant of authority not specific); *see also First American Title Company v. South Dakota Land Title Association*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984); *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989); *Crosby v. Hospital Authority*, 93 F.3d 1515 (11th Cir. 1996). Even though the grant of legislative authority did not specifically address the actions that were the subject of the lawsuits, the courts in *Martin, First American, Hass and Crosby* granted state action immunity to the defendant state agencies.

In applying *Town of Hallie* in these proceedings, the Fifth Circuit ruled that it could not "deny the state-exemption based merely upon the failure of the Louisiana legislature to expressly state an intention to displace competition . . ." and further wrote that

> [a]s the Supreme Court has noted in an analogous context, such an approach would take an "unrealistic view of how legislatures work and of how statutes are written. *Town of Hallie*, 471 U.S. at 43; (other citations omitted).

Pet. App. 21a. The Fifth Circuit opined:

> Objectively, the Louisiana legislature "intended" that the Board, through its members, exercise any power which the legislature authorized. Here, the Board was authorized to "[a]dopt and enforce all rules and regulations, by-laws and rules of professional conduct as the Board may deem necessary and proper to regulate the practice of public accounting in the State of Louisiana." LA. REV. STAT. ANN. § 37:75(B)(2) (West 1988). This is a broad grant of authority which includes the power to adopt rules that may have anticompetitive effects. It is thus the "foreseeable result" of enacting such a statute that the Board may actually promulgate a rule that has anticompetitive effects.

Id.

Finally, in correctly applying this Court's holding in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), the court of appeals concluded:

> Our analysis is faithful to the principles of federalism that gird the state-action doctrine. As the Supreme Court has noted:
>
> > If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult

> to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.

Southern Motor Carriers, 471 U.S. at 64. We thus conclude that the "clear articulation" requirement is satisfied by the Louisiana statutes which bless the Board with broad rulemaking authority over the profession of public accounting within the state.

Pet. App. at 22a.

In their attack of the Fifth Circuit's decision relating to the active supervision prong of the *Midcal* test, petitioners characterize the determination as a "categorical judgment" based upon "nothing more than 'the public nature of the Board's actions' to dismiss danger of willful anticompetitive action." Pet. at 28. Petitioners' argument is an oversimplification and ignores the Fifth Circuit's careful articulation and rejection of petitioners' inappropriately narrow construction. In this matter, the Fifth Circuit rejected correctly petitioners' argument and opined:

> Despite the fact that the Board is composed entirely of CPAs who compete in the profession they regulate, the public nature of the Board's actions means that there is little danger of a cozy arrangement to restrict competition. So long as the Board is acting within its authority and pursuant to a clearly established state policy, there is no need

> for active supervision of the properly delegated authority.

Pet. App. at 16a-17a. The Fifth Circuit further noted:

> This conclusion comports with our prior precedents and that of other courts of appeals. (Citations omitted). Moreover, this development was expressly anticipated by the Supreme Court's *Town of Hallie* decision. *See Town of Hallie,* 471 U.S. at 46 n.10 ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.").

Pet App. 17a.

The Fifth Circuit's careful reasoning and thoughtful analysis does not "conflict with the approach taken by other circuits' as alleged by petitioners. To the contrary, the decision is consistent with the teachings of this Court and in line with the decisions of other circuits that have addressed the issue. Consequently, the Fifth Circuit's decision should not be disturbed.

CONCLUSION

For the foregoing reasons, Respondents, the State Board of Certified Public Accountants of Louisiana and its members, respectfully urge this Honorable Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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